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- - - - -End Footnotes- - - - -

[\*166] The various aspects of Article III standing are too complex to discuss seriatim here. n578 Rather, I will illustrate my point about the differing implications of the Direct and Derivative Accounts by discussing one aspect that has been particularly salient and contested in recent years. That concerns whether persons who seek more stringent government regulation have Article III standing to challenge a regulatory regime that, they claim, is not stringent enough. n579 For example, in *Allen v. Wright* itself, black schoolchildren claimed that the Internal Revenue Service's failure to ensure a denial of tax exemptions to racially discriminatory private schools violated the Equal Protection Clause as well as statutory requirements. n580 The Court held that the schoolchildren lacked standing, given the absence of a clear causal link between the IRS's tax-exemption policies and any concrete harm the schoolchildren might suffer - for example, the harm of attending segregated public schools. n581 And a broadly similar scenario has arisen in other leading Supreme Court standing cases, such as the recent *Lujan* case, where again the Court denied standing to (alleged) beneficiaries (this time, to environmentalists who challenged on statutory grounds the government's failure to enforce the Endangered Species Act abroad); n582 and in the *Akins* case last Term, where the Court (over the dissent of three members) granted standing to voters who challenged the Federal Election Commission's decision not to proceed with an enforcement action against an alleged violator of the election laws. n583

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n578. For a survey, see Chemerinsky, *supra* note 290, 2.3.

n579. See generally *Lujan*, 504 U.S. at 561-62 (stating that Article III standing is much more difficult to establish where the target of the challenged government action, or inaction, is not the claimant herself, but some third party).

n580. See *Wright*, 468 U.S. at 740-50.

n581. See 468 U.S. at 752-61.

n582. See *Lujan*, 504 U.S. 555.

n583. See *FEC v. Akins*, 118 S. Ct. 1777 (1998). Other important standing cases where this scenario has arisen include: *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) (denying standing) (challenge by indigents to favorable tax treatment, by IRS, of hospitals that fail to provide full services to indigents); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683-90 (1973) (granting standing) (challenge by environmentalists to decision, by ICC, permitting surcharges by railroads); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (denying standing) (equal protection challenge, by mother of illegitimate child seeking support for that child, to Texas child-support statute that covered only the parents of legitimate children); and *Sierra Club v. Morton*, 405 U.S. 727 (1972) (denying standing) (challenge by environmentalists to forest service's approval of plan by an entertainment company to develop portion of national forest). See also *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998) (denying standing) (suit by environmental group against manufacturer pursuant to

"citizen suit" provision of Emergency Planning and Community Right-to-Know Act). Technically, Sierra Club and SCRAP involved standing under the Administrative Procedure Act, but the issues involved in these cases (injury-in-fact and causation) would now be understood as going to Article III standing.

- - - - -End Footnotes- - - - -

[\*167] To put the problem in terms of our stylized cases: imagine that, in Alcohol, a rule prohibiting the sale of alcohol to men (but not to women) between the ages of eighteen and twenty-one is challenged on equal protection grounds by an association of bicyclists. The bicyclists believe that women under twenty-one, like men, are prone to driving while intoxicated; they seek, optimally, a judicial extension of the rule to women or, failing that, a judicial invalidation which (they hope) will in turn prompt a legislative extension. Do the bicyclists have standing? The proponent of the Direct Account is likely to say no, for two reasons. First, she will demand a threshold showing of some setback to the bicyclists' interests, such that (the bicyclists will then claim) moral reason obtains to reverse that setback. If, for example, the bicyclists cannot show at the threshold that women between eighteen and twenty-one are indeed prone to drive while intoxicated, then the gender-discriminatory scope of the rule does not affect their safety, and the bicyclists lack the feature of a personal setback which - on the Direct Account - is an integral feature of constitutional adjudication. Second - whether this is seen as a problem of Article III or of prudential standing - the question will arise whether the bicyclists are the moral beneficiaries of the Equal Protection Clause. n584 Imagine, for example, that the Clause is seen to be animated by the morally unwarranted stigma that flows from discrimination, or by the exclusion of outside groups from political participation. n585 Bicyclists are not stigmatized by the rule in Alcohol, nor have they been excluded from the political process. Thus, at least on this reading of the Equal Protection Clause, the proponent of the Direct Account will find it anomalous to let the bicyclists challenge the no-alcohol rule: even if the rule does cause them a personal setback, that setback violates no constitutionalized moral right of theirs.

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n584. See Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (holding that standing requires, beyond the existence of a case or controversy, that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

n585. For a discussion of possible defenses of the Direct Account grounded upon these rationales, see supra section II.B.2; supra text accompanying notes 254-55.

- - - - -End Footnotes- - - - -

By contrast, for the proponent of the Derivative Account, a personal setback on the bicyclists' part is extrinsic to the process of constitutional adjudication. She may, at the threshold, require some non-trivial probability that the scope of the no-alcohol rule affects their interest in safety or some other suitably personal interest - as a means to ensure sufficiently adverse litigants, or perhaps for other reasons - but she will likely eschew the

elaborate thresh [\*168] old inquiry into the litigant's personal setback that the Direct Account requires, and that was evident in Allen and Lujan. n586 As for the fact that the bicyclists, themselves, may not be the moral beneficiaries of the Equal Protection Clause: that is simply irrelevant for the Derivative Account. The Equal Protection Clause, on that account, simply identifies certain morally unwarranted rule-types; any (sufficiently adverse) litigant has the legal right to secure the invalidation of such rules. The bicyclist harmed by the discriminatory rule may, himself, not have a moral claim to overturn that treatment grounded in the Equal Protection Clause; but, then again, neither does the young man who breaches the no-alcohol rule by purchasing beer with a stolen credit card.

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n586. See Lujan, 504 U.S. at 562-71; Wright, 468 U.S. at 752-61.

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A similar point can be made about a constitutional and prudential doctrine closely related to standing: the doctrine of ripeness. This doctrine concerns the timing of judicial review. It looks both to the "hardship to the parties of withholding court consideration" and to the "fitness of the issues for judicial decision." n587 For the proponent of the Direct Account, the ripeness doctrine - like standing - is (at least in part) intrinsic to the very practice of constitutional adjudication. If the litigant has not, yet, suffered "hardship," then there is not yet, for her, a personal setback to which her claim of constitutional right can attach.

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n587. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967). See generally Gene R. Nichol, Jr., Ripeness and the Constitution, 54 U. Chi. L. Rev. 153 (1987) (surveying and discussing ripeness jurisprudence).

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Preenforcement challenges to rules pose one major category of ripeness problems. n588 Can a claimant whose freedom is allegedly restricted by a rule adjudicate her constitutional or statutory challenges to the rule immediately upon its enactment, or must she wait until the rule is enforced against her? The proponent of the Direct Account may well make the claimant wait, at least absent specific evidence that the rule has a coercive effect on the claimant. On the Direct Account, the paradigmatic constitutional suit is a retrospective challenge to some sanction the claimant has received for an action she has already performed. In such a temporal posture, there can no question about the existence of a concrete setback to the claimant. By contrast, in a preenforcement challenge the question remains open whether the rule's duty constitutes a true hardship for claimant: whether she really wants to perform an action covered by the rule and, if so, whether the chance of her being sanc [\*169] tioned for that is significant. As the Court explained in United Public Workers v. Mitchell, n589 the high-water mark of a stringent ripeness doctrine, where the Court declined to hear a preenforcement free speech challenge to the Hatch Act (prohibiting political activity by government employees): n590

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n588. See Chemerinsky, *supra* note 290, 2.4, at 115.

n589. 330 U.S. 75 (1947).

n590. See Mitchell, 330 U.S. at 86-91 (declining to hear preenforcement challenge); 330 U.S. at 91-94 (agreeing to hear challenge by employee who had already been charged by Civil Service Commission with political activity, and where the Commission had entered a proposed order for his removal).

- - - - -End Footnotes- - - - -

The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements .... It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality ... except when definite rights appear upon the one side and definite prejudicial interferences upon the other. n591

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n591. 330 U.S. at 89-90.

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Strains of the Direct Account are clearly audible here.

In the years following Mitchell, the Court considerably relaxed the ripeness barrier to preenforcement challenges to rules - most visibly in *Abbott Laboratories v. Gardner*, n592 which permitted a preenforcement statutory challenge to an FDA regulation, and thereby opened the door to routine preenforcement review within federal administrative law. n593 A similar relaxation occurred for constitutional suits. As one commentator has noted: "The Court ... routinely entertains suits to declare statutes unconstitutional, invoking the ripeness requirement only occasionally." n594 But it is, now, far from clear whether this relaxed ripeness regime will continue. The Court took a sharp turn toward renewed stringency in *Reno v. Catholic Social Services, Inc.*, n595 where it sua sponte rejected as unripe a preenforcement class-action challenge to a benefit-conferring rule.

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n592. 387 U.S. 136 (1967).

n593. See Mashaw, *supra* note 423, at 179 (noting that "preenforcement review has become the norm" within administrative law).

n594. Douglas Laycock, *Modern American Remedies* 498 (2d ed. 1994).

n595. 509 U.S. 43 (1993).

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"Injunctive and declaratory judgment remedies ... are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution," that is to say, unless the [\*170] effects of the administrative action challenged have been "felt in a concrete way by the challenging parties."

... The promulgation of the challenged regulations did not itself give each ... class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps [of applying individually for the benefit and being rejected]. n596

The Court has not, yet, extended Reno's renewed stringency to conduct-regulating rules - but there are some hints that it may do just that. n597

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n596. *Catholic Social Servs.*, 509 U.S. at 57, 59 (footnote and citations omitted) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)); cf. 509 U.S. at 67-70 (O'Connor J, concurring in the judgment) (criticizing majority's ripeness holding); 509 U.S. at 77-83 (Stevens, J., dissenting) (same).

n597. See 509 U.S. at 58 (suggesting that "a controversy concerning a regulation is not ordinarily ripe for review ... until the regulation has been applied to the claimant's situation by some concrete action"); *Renne v. Geary*, 501 U.S. 312, 320-23 (1991) (finding unripe anticipatory, free-speech challenge to provision of California Constitution - albeit enforceable only by injunction - that prohibited political parties from endorsing candidates for nonpartisan offices); see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (holding that statute precluded preenforcement challenge, by mine operator, to sanction-backed agency order requiring operator to designate union members as representatives for safety inspections at mine). For recent evidence, in other contexts, of the Court's seriousness about ripeness doctrine, see *Texas v. United States*, 118 S. Ct. 1257 (1998), and *Ohio Forestry Association v. Sierra Club*, 118 S. Ct. 1665 (1998).

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The proponent of the Direct Account will be cheered by Reno; the proponent of the Derivative Account will be alarmed. Ripeness, like standing, is extrinsic to the Derivative Account. There is no preference, within that account, for retrospective rather than anticipatory challenges. Just the opposite: if a rule is morally and constitutionally invalid, then, *ceteris paribus*, the rule ought to be repealed or amended as soon as possible. I say "*ceteris paribus*" because there may well be countervailing considerations, acceptable to the Derivative Account, that weigh in favor of postenforcement rather than preenforcement review. For example, as Jerry Mashaw has noted, "review at the application

stage ... provides a better information base." n598 Further, by invoking the threat of preenforcement review against an administrative agency, organized litigants may be able to force changes, benefiting themselves, in the terms of perfectly valid rules. These kind of considerations may, perhaps, lead the proponent of the Derivative Account to concur in a tightening of the ripeness requirements for anticipatory challenges. What is the optimal timing for constitutional challenges, such that invalid rules are maximally repaired, yet with minimal judicial interference against the enforcement of valid rules? It is upon that question, and not upon some further preference for a [\*171] maximally concrete harm to the litigant that, within the Derivative Account, the viability of preenforcement review should hinge.

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n598. Mashaw, *supra* note 423, at 179.

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The points I am making here could be multiplied, and applied to other procedural doctrines besides ripeness, standing, and the others I have discussed. Virtually any procedural doctrine will be viewed one way within the Direct Account, and another way within the Derivative Account. Consider, for example, abstention doctrine. The Court's announcement, in *Younger v. Harris*, n599 that a federal court must abstain from issuing an injunction against a state criminal statute where a prosecution of the claimant pursuant to that statute has already begun, was clearly shaped by the view that the sweeping relief effected by an injunction was not the kind of relief inherent to constitutional rights: "The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision." n600 Or consider nonacquiescence doctrine, which I discussed above in section III.B.2. Here, it is the Derivative Account, not the Direct Account, that makes an intrinsic demand upon this procedural doctrine: intrinsic to the Derivative Account is the proposition that (most or all) nonjudicial actors should acquiesce in judicial decisions declaring statutes to be invalid, at least where the relevant courts are unanimous. By contrast, the proponent of the Direct Account can be agnostic about nonacquiescence. n601

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n599. 401 U.S. 37 (1971).

n600. *Younger*, 401 U.S. at 52. Relatedly, and even more fundamentally, the proponents of the Direct and Derivative Accounts may well disagree about the proper scope of the fiction established by *Ex parte Young*, 209 U.S. 123 (1908), permitting federal suits for prospective relief against state officers despite the Eleventh Amendment. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2038-40 (1997) (opinion of Kennedy, J.) (arguing that *Ex parte Young* should be applied on a case-by-case basis to suits for prospective relief, rather than automatically).

n601. See *supra* notes 499-513 and accompanying text (discussing nonacquiescence).

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But it bears emphasis that the deepest implications of the Derivative Account are substantive, not procedural. The Direct Account makes stringent demands on the content of substantive constitutional doctrines. How can moral reason obtain to overturn X's own treatment, independent of further invalidating the rule under which that treatment falls? Someone who stipulates the existence of such reason, as an entailment of X's constitutional right, must choose one of two options. Either she abandons the Basic Structure entirely, and therewith the judicial focus on the predicate and history of rules. In that event, constitutional adjudication changes radically, and becomes a moral inspection of X's action or actions rather than of some rule that X challenges. Or, less radically, she identifies some feature of rules such that sanctioning actors pursuant to rules with that feature violates their moral rights independent of the proscribability of their actions under different descriptions. But what would such a feature be? If anything, it would be the discriminatory cast of a rule. Sanctioning X pursuant to a discriminatory rule can violate her nonepistemic moral rights, as in the case of racial stigma. Failing that, it can arguably violate her epistemic moral rights, insofar as discrimination evidences false beliefs, among legislators, about the moral relevance of the rule-predicate. n602

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n602. See supra section II.B.2; supra text accompanying notes 218-19 (discussing possible nonepistemic and epistemic defenses of Direct Account, linked to concept of discrimination).

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So, if the Direct Account obtains, constitutional law should become a series of antidiscrimination norms: norms that constrain rules not to discriminate on the basis of gender, race, speech, or religion. At a minimum, a right against discrimination should become the central and animating paradigm of a constitutional right. And indeed, in recent years, the Court has become increasingly concerned with the discriminatory cast of rules, to the exclusion of other moral failings that the Derivative Account might recognize. In Smith, n603 the Court reworked its free exercise doctrine so as to eliminate any right of religious actors to be exempt from nondiscriminatory rules; n604 in the area of free speech, too, "content discrimination" has become the major if not quite exclusive trigger for judicial intervention. n605 Has this trend, in fact, been caused by the Justices' adherence to the Direct Account? Who knows. Should it be reversed, if the Derivative Account is instead correct? Not necessarily - for there may be independent reasons why the Discrimination Schema should be the sole or main rule-validity schema within that account.

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n603. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

n604. See supra text accompanying notes 109-13 (discussing change in free exercise doctrine worked by Smith).

n605. See supra note 357 and accompanying text (noting increasing focus, in free speech doctrine, on rules that discriminate against speech or

speech-types).

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I tend to doubt that such reasons exist. The Liberty Schema, not just the Discrimination Schema, is integral to constitutional law - or so I have already argued. n606 But the point I want to make here is a more basic one. Assume, for example, that the constitutional criterion of "free speech" picks out some liberty (some type [\*173] of action it is morally important for persons to be free to perform, absent overriding reason); that judicial invalidation of rules abridging the liberty of speech is not self-defeating; and that courts are epistemically, democratically, and otherwise well placed to identify some such rules. n607 If so, courts should invalidate (some) rules that violate the liberty of speech, whether or not those rules are discriminatory. There is no bias, within the Derivative Account, toward rule-validity schema that preserve the "personal" cast of constitutional rights, since constitutional rights do not have such a cast. Discrimination may or may not be definitive of constitutional rights; but on the Derivative Account, there is nothing about the moral content of constitutional rights that requires it to be. The Direct Account - if its implications were truly drawn - would tightly constrain the ways in which rules can be constitutionally invalid. In this sense, the Direct Account encapsulates an argument for judicial restraint, within the very concept of a constitutional right. The Derivative Account, the correct account, does not.

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n606. See supra text accompanying notes 358-69.

n607. These are, within the Derivative Account, the individually necessary and jointly sufficient conditions for rules violating the liberty of speech (in the sense set forth by the Liberty Schema) to be properly invalidated by constitutional reviewing courts. On the problem of self-defeating review, see supra text accompanying notes 361-64; on the problem of the epistemic and remedial capacities of courts, see Adler, supra note 4, at 771-80.

- - - - -End Footnotes- - - - -

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ARTICLE: PICKING FEDERAL JUDGES: A MYSTERIOUS ALCHEMY Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan. By Sheldon Goldman. New Haven: Yale University Press. 1997. Pp. xv, 428. \$ 45.

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#### SUMMARY:

... The first nomination, in December 1995, lapsed at the end of the 104th Congress. ... Wisconsin Senator Alexander Wiley headed the Senate Judiciary Committee. ... It is somewhat surprising, given the previous results, that the Republican leadership would resurrect Senator Wiley's old playbook. ... Determined to block the appointment of women and blacks, Senator Wiley brought the American Bar Association into the process to screen and give its evaluation of nominees - previously the function of the Justice Department and the FBI (pp. 86-88). ... The President-elect and Attorney General-designate Griffin Bell had met with Senate Judiciary Committee Chairman James O. Eastland in December to discuss changes in judicial selection. ... This measure of openness was reflected in the Senate where, beginning in 1979 with Senator Kennedy assuming the Judiciary Committee chairmanship, blue slips could no longer be used to block action on a nomination. ... Reagan made phone calls to those who were selected asking them to serve - a technique that was not only flattering, but certain to reinforce to the appointee that he was a Reagan appointee (p. 294). ... Unable to persuade Abdnor, the Republican leadership changed the rules in midsession so that a senator could no longer place a "hold" on a judicial nominee from another state (pp. 321-22). ...

#### TEXT:

[\*1578]

Each filling of a judicial vacancy is a minidrama of individual ambitions, backstage maneuverings, mobilization of support, and occasional double-dealing, and is affected by the values of those involved in the process. There is human drama as political forces, events and personalities intersect. And the end result is the staffing of the third branch of government, which by its actions - or inactions - has a profound effect on American lives. [p. 365; footnote omitted]

With these words, Professor Goldman n1 concludes the lesson he began nine chapters earlier as he embarked on his exploration of the seldom-mapped territory where the American government sets about building that smallest part of itself that has the most day-to-day continual contact with the American people. But I would hope that the readers of this review and of this book would keep that simple lesson uppermost in mind as they consider Sheldon Goldman's unique contribution to our understanding of ourselves.

-Footnotes-

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-End Footnotes-

Introduction

I have twice been nominated to the federal bench by President Clinton. The first nomination, in December 1995, lapsed at the end of the 104th Congress. I was renominated in March 1997. I have never had a hearing and never had a letter from the Senate Judiciary Committee requesting additional information. In 1995 and again in 1997 the White House precleared my nomination with my two home-state Republican senators. Originally, I was nominated before the scheduled retirement date of the judge I was named to replace, which gives knowledgeable readers an idea of the lack of controversy surrounding my appointment. I had strong bipartisan support. In July of 1997, however, almost two years to the day after [\*1579] I was first recommended to the President by the Texas congressional delegation, my affirmative blue slips were suddenly withdrawn by the Texas senators. n2

-Footnotes-

n2. See Neil A. Lewis, *Jilted Texas Judge Takes on His Foes in Partisan Congress*, N.Y. Times, Nov. 16, 1997, at 1; Henry Weinstein, *Drive Seeks to Block Clinton Judicial Nominees*, L.A. Times, Oct. 26, 1997, at A3. These articles discuss the political nature of the stall placed upon President Clinton's nominees and efforts by right-wing groups to involve Republican senators in their fundraising projects by linking them to blocking federal judicial nominations.

-End Footnotes-

For those readers who have no idea what withdrawal of blue slips means, I recommend perusing Sheldon Goldman's *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan*. It should be read by every lawyer who wants to be a federal judge as well as by those who practice in front of them. Much of its importance resonates in the current political atmosphere and can be seen in the increased attention given to presidential nominations, judicial or otherwise, in both the popular press and legal academia. This is due in part to the personal peccadilloes of the nominees - consider, for example, former Senator John Tower's lifestyle, which was so criticized by his fellow Republicans, or Zo<sup><um e></sup> Baird's failure to pay social security on domestic help despite two large professional incomes. The nominee becomes a caricature of a social problem and an object lesson for the public.

It is also important to a growing understanding of the role these once-anonymous persons play in the life of the Republic and in the lives of each of us. This latter realization may account for the proliferation of scholarly articles devoted to the nomination process that have appeared in the last few years. n3 These articles, however, are not likely to be read widely even in legal circles. Goldman's book provides information to lawyers, judges, the press, and the general public in an anecdotal format and with an astounding [\*1580] amount of insider detail - including handwritten notes between presidents and their confidants. n4 He spends little time on well-covered Supreme Court nominations, concentrating as his subtitle says on lower court selection.

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n3. Some articles of interest include: Richard S. Arnold, *Judicial Politics Under President Washington*, 38 Ariz. L. Rev. 473 (1996); Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 St. John's L. Rev. 757 (1993); John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & Econ. 435 (1996); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 *Judicature* 294 (1991); Orrin G. Hatch, *The Politics of Picking Judges*, 6 J.L. & Pol. 35 (1989); Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 Am. U. L. Rev. 699 (1995); R. Samuel Paz, *Federal District Court Nomination Process: Smears of Controversy and Ideological Sentinels*, 28 Loy. L.A. L. Rev. 903 (1995); Wm. Bradford Reynolds, *The Confirmation Process: Too Much Advice and Too Little Consent*, 75 *Judicature* 80 (1991); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 Alb. L. Rev. 1111 (1994); Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 SMU L. Rev. 309 (1996); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. Rev. 1257; Oona A. Hathaway, *The Politics of the Confirmation Process*, 106 Yale L.J. 235 (1996) (book review); Orrin G. Hatch, *Making a Real Mess*, 1995 Pub. Interest L. Rev. 139 (book review); Gary A. Hengstler, *At the Seat of Power*, A.B.A. J., Apr. 1995, at 70; Elena Kagan, *Confirmation Messes, Old and New*, 62 U. Chi. L. Rev. 919 (1995) (book review); Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 Yale L.J. 549 (1995) (book review).

n4. In filling a vacancy on the Third Circuit, Roosevelt wrote at the bottom of a memo recommending one candidate named Jones, "Guffey backing MM," indicating Senator Guffey's endorsement of a different candidate, Musmanno. Roosevelt then turned around and, after applying personal charm and pressure, appointed a third man who did not want the judgeship but who was the President's choice. P. 28.

- - - - -End Footnotes- - - - -

Goldman's book is a work of political science, and it is short on the historical context that would be useful to interpret the tables located throughout the text. In fact, it does not tell you nearly enough about blue slips. n5 But it certainly will allow you to refute the common misconception that the politicization of nominations started with Judge Bork.

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n5. The blue slip was the extra-constitutional administrative convenience adopted early in the Eisenhower presidency as a way for home-state senators to indicate their support of or opposition to a nomination. It gives the committee chair a way to be advised in a nonpublic manner of the private views of a colleague. The blue slip only has the force the committee chair is willing to give to it, although there have been attempts to give it greater effect by resolutions of party conferences in the Senate. It is not to be confused with a "hold," which is a sort of secret club blackball that allows any senator to block a vote on a nominee from any state for any office for any reason or no reason by simply advising the majority leader that s/he desires to hold the nomination. Both practices have been criticized. See, e.g., Henry J. Abraham, *The Judicial Process* 23-24 (6th ed. 1993); George C. Edwards III & Stephen J. Wayne, *Presidential Leadership: Politics and Policy Making* (4th ed. 1997).

- - - - -End Footnotes- - - - -

I wish to settle that bit of historical inaccuracy first: politicization of the process of selecting federal judges has been around for a long time. Less than two years after Truman became president upon the death of Roosevelt, the Republicans gained control of the Congress. Wisconsin Senator Alexander Wiley headed the Senate Judiciary Committee. According to Goldman, Senator Wiley announced even before he assumed the chairmanship that the Senate would confirm no "leftists" (p. 81). Soon after, he stated he wanted a political balance in appointments - that is, more Republicans. Next, he proclaimed his opposition to any New Dealers. His committee held up nominations and the number of confirmations began to drop: sixteen in 1946 when the Democrats were in control, ten in 1947 under the party opposite the president, and in 1948, anticipating President Dewey, the total confirmed by the Republican-controlled Senate dropped to three (p. 81).

I cannot say, for this is not a history book, whether this strategy led to the appellation "do-nothing Congress" and the triumph of Harry Truman. It was, however, nearly fifty years before the country chose again to have a Democratic President paired with a Republican Senate. It is somewhat surprising, given the previous results, that the Republican leadership would resurrect Senator [\*1581] Wiley's old playbook. Yet here we are today, hearing almost the same words and watching the same damming up of the process.

Contrast this approach to Goldman's account of the Democratic-controlled Senate's approach to President Nixon's judicial nominees as impeachment and resignation loomed. As August 1974 began, only one of Nixon's judicial appointees remained pending. Then, on August 8, his last full day in office, Richard Nixon nominated three more judges. All four of his final nominees were confirmed (p. 226).

As Professor Goldman makes obvious to the diligent reader, there is no need for Wiley-like behavior. n6 This system designed by our Founding Fathers is so evenly balanced that by 1961, after twenty years of Roosevelt-Truman followed by only eight years of Eisenhower, the federal judiciary was evenly split between Democrat and Republican office holders (p. 157). This is despite the fact that the Senate had a Democratic majority for twenty-two of those twenty-eight years, including the final four opposite Eisenhower. It is an excellent example of letting the political market take its course without deliberate interference. Individual candidates should be reviewed on the merits. That is what the Constitution demands and expects. Those who would deliberately interfere with

the process in order to limit the total output are selfish and reckless. They are selfish because deliberate interference is a bullying tactic adopted by sore losers that says in effect: you won but you can't have the prize. They are reckless on two bases. On a narrow basis, this strategy led the Republicans to defeat in 1948. On a wider basis, it interferes with the natural pendulum swing of free ideas which has protected our nation from the upheavals so common in other democracies.

- - - - -Footnotes- - - - -

n6. We are experiencing this mindless partisan resistance once again and it is hurting the selection process and crippling the courts. In his year-end report, Chief Justice William Rehnquist noted how these partisan divisions and the Senate's inordinate delay in acting on nominations were leaving the judiciary shorthanded. William H. Rehnquist, 1997 Year- End Report on the Federal Judiciary (Jan. 1, 1998). The news media has responded to the harm caused by this delay and focused on the federal courts' productivity as at no other time. One article noted that in 1990, retired judges handled 3049, or 14.6% of the 20,836 federal trials. By 1997, the total number of trials was down to 17,266 yet trials presided over by the senior federal judges had risen to 3524 (or 20.4%). Pekkanen & Gill, Judicial Vacancies Force Delays Create Case Backlog, The Detroit News, Feb. 8, 1998, at A5. In the U.S. Senate, Vermont Senator Patrick Leahy (D) has responded by introducing the "Judicial Emergency Responsibility Act," which would prevent lengthy Senate recesses and require the Senate to act on judicial nominations within 60 days during any declared judicial emergency. S. 1906, 105th Cong. (1998).

- - - - -End Footnotes- - - - -

[\*1582]

A state without the means of some change is without the means of its conservation.

- Edmund Burke n7

- - - - -Footnotes- - - - -

n7. The Oxford Dictionary of Quotations 111 (3d ed. 1979).

- - - - -End Footnotes- - - - -

#### Perspective

The best way to approach this book is to use the same roadmap as Professor Goldman - the successive presidential administrations that have introduced judicial nominees to the Senate and the people. He does so in nine chapters, with the first giving a general overview from 1789 to 1933. Seven chapters follow analyzing the selection process and criteria by each administration from Roosevelt to Reagan (Kennedy and Johnson are considered in one chapter, as are Nixon and Ford). The final chapter reprises what has gone before and then, for scholars or the incurably curious, a concise note on the sources available to

most anyone, and finally forty-two pages of excellent detailed notes. I shall follow the same route and take the chapters and presidents in order.

While the opening chapter in Goldman's book is entitled "Judicial Selection in Theoretical and Historical Perspective," it is really more a description of his personal framework for reading a president's mind. He describes three presidential agendas: policy, partisan, and personal (p. 3). The policy agenda is "the substantive policy goals of an administration." The partisan agenda is Goldman's shorthand for the use of power "to shore up political support for the president or for the party." Finally, the chief executive's personal agenda is not surprisingly defined as his use of "discretion to favor a personal friend or associate." From time to time in later passages the author reminds the reader of these concepts as he discusses the making or unmaking of a particular nomination or how one agenda was served by another. The problem with the agenda concept is that some presidents delegated this job almost completely. Furthermore, the relative value Goldman places on these distinctions is apparently low since there is no chart referencing or cross-referencing this information. It appears sporadically in the text and not in the final summations.

Goldman uses historical perspective to mean a summary of the period between the Constitutional Convention and Herbert Hoover - that is, the time prior to the start of Goldman's research. Perhaps because I majored in history and have made it a lifelong passion, I craved historical perspective. It is difficult to determine what any president was thinking, policy versus party interests, if you cannot put decisions into the context of the issues of the times and [\*1583] the place. If this book is ever updated it ought to be coauthored by a historian.

#### Roosevelt

Franklin Roosevelt's meticulous attention to the slightest detail and his apparent delight in manipulating the pieces on the chessboard are the hallmarks of his selection of judges for the federal bench. If the author's agenda analysis is helpful at all, it is perhaps most helpful here in appreciating Roosevelt's understanding of how the three tracks can be used all the time. FDR was quick to see that the old men on the Supreme Court could prevent the reforms he had conceived to rescue the nation from depression and revolution. He was quick to see a solution and to push it despite the cautions from his close advisers. When public opposition forced the Congress to reject his court-packing plan, Roosevelt quickly adapted. The natural attrition of death and retirement soon allowed his nominees to become members of the Nine. In turn he directed his attention to the lower courts and their impact on his policies.

Although the author does not discuss the question, it may be that FDR's experience as a governor of a state with a judiciary that was entirely elected helped to inform his approach to picking judges. He understood the nuances of filling vacancies and satisfying the patronage needs of an individual senator from his New York experience. But here on the larger stage he saw a broader picture and sought nominees who would help fill out the canvas. Consequently, as Goldman makes clear, he took an active role in looking for and screening the nominees sent to him. FDR understood that senators had both partisan and personal agendas that he could use to his advantage. Still, he was cautious. While he attempted to meet the needs of specific New Deal constituencies such as minorities and women, he did not act so precipitately that he alienated another part of the coalition, whether southern senators or city bosses, on a specific

nomination. Numerically, he succeeded in placing the first woman on a federal court of general jurisdiction - Florence Allen on the Sixth Circuit - and the first black on a federal district bench - William Hastie in the Virgin Islands (pp. 51- 57). Roosevelt found that his discretion was circumscribed by the Senate as well as by his own desire to achieve his other broader policy goals.

#### Truman

Coming into the presidency as he did, Harry Truman carried on where Roosevelt left off. This is true of his judicial appointments as well. If there was a honeymoon for the man who found himself facing Stalin at Potsdam and making the decision to drop the [\*1584] atomic bomb, it was not in the area of picking judges. In office for a week, he was visited by the senators from North Carolina to discuss judgeships in that state (p. 68).

More a political figure than a national one like Roosevelt, the former senator was more deferential to the wants and desires of senators - even Republican senators - than his predecessor. Yet he came to understand the prerogatives of his new office and to guard them stubbornly if need be. Like Roosevelt, Truman worked through his Attorney General and the Democratic National Committee chair on judicial appointments. Unlike Roosevelt, Truman was more of a hands-off president and rarely attempted to micromanage the process of finding, selecting, vetting, appointing, and confirming his judges (p. 69). He did pay close attention to what happened in his home state of Missouri even as its political leaders and its senators worked names through the system.

Truman's appreciation for patronage and party building seems to have smoothed much of his appointment road, but there were some exceptions. In Georgia, Truman elevated the brother of Senator Russell to the Fifth Circuit, but then he and the Senator disagreed over the brother's successor. Finally, after a long fight the two men met and Truman agreed to Russell's choice (pp. 71-72). In Vermont, Truman fought and won a behind-the-scenes battle with the Vermont Democratic Party leadership to name a Republican and former senator to a federal district court in that state (p. 69). The Vermont Democrats were focusing on party building and Truman on naming a man he knew and respected, regardless of party.

An intra-party fight among California's Democrats illustrates the problem of state-by-state selection that drove President Carter years later to try to rationalize and systematize the process on a national basis. Party factions in California were at loggerheads on potential nominees for two district court vacancies. The party organization had its choices and the state's senior senator had his own. Stalemate set in for over a year and each attempt by Truman to make peace ended in failure, if not renewed acrimony. Finally, illness forced the senator's retirement and Truman was able to make his own choice - one from each faction (pp. 72-73).

With the Republican victory in the 1946 congressional elections, Truman faced a hostile Senate and a Republican majority confident that the president was irrelevant. The result was the program of Senator Wiley mentioned above - no leftists, no New Dealers, more Republicans and in the end almost no confirmations (p. 81). Determined to block the appointment of women and blacks, Senator Wiley brought the American Bar Association into the process to screen and give its evaluation of nominees - previously the function [\*1585] of the Justice Department and the FBI (pp. 86-88). Wiley's plan worked. Even after Truman's victory in 1948, the ABA's participation ensured that by the end of

his term he had named only one woman, Burnita Matthews of Mississippi backed by Senators Eastland and Stennis, to the federal district court. He also elevated William Hastie to the Court of Appeals for the Third Circuit (pp. 96-97, 100-01).

On the public policy front, Truman carried to completion the legislative programs of the New Deal and began civil rights initiatives, but this seems unconnected to his judicial appointments, where he focused on accommodating individual senators. Or was it unconnected? Truman's number of appointments of Catholics and Jews to the federal judiciary was many times that of Roosevelt, reflecting their importance in the ruling Democratic coalition (pp. 107-08). The picture emerges of a president more conscious than his predecessor of the impact judicial appointments have on other policy choices made by the legislative branch, but more confident of his ability to understand and influence those choices without micromanagement that would cost him both legislative support and his nominees.

#### Eisenhower

Not surprisingly, the management style of a president who had grown up in the electoral rough-and-tumble of western Missouri politics was different from that of his successor. Dwight Eisenhower had spent a lifetime in the command structure of a professional army and was noted for understanding the impact of logistics on victory. Both Harry and Ike got along well with subordinates - few other presidents radiate that comfortable feeling of first-name familiarity - and were students of persons and personalities. But each demonstrated an approach to picking judges that resembled his own management style. Truman's sit-down-and-deal gave way to Eisenhower's by-the-book. But Eisenhower understood that there was both a governmental and political purpose to this exercise.

When Eisenhower took office after twenty years of Roosevelt and Truman, the judiciary was 77.5% Democratic appointees (p. 112). This level of imbalance would not be matched until Clinton succeeded twelve years of Presidents Reagan and Bush.<sup>n8</sup> A former military man, at first the new president liked judicial nominations to go through channels. But realizing their dual governmental and political purpose, he soon directed that judicial nominations be cleared through the Republican National Committee. As time went [\*1586] on and he learned more about the process, he instructed the Attorney General to put him in the decisionmaking loop (p. 113). But Eisenhower became dissatisfied with even this approach as he felt that he needed to be involved before the final decision was made. He called for closer consultation with the Justice Department earlier in the process. Goldman does not say it, but you come away with the feeling that Eisenhower was impelled to have the same influence on who moved up in the judiciary as senior commanders have on the development of the officer corps. It also seems clear that he wanted some flexibility so that he could deal with the Senate.

-Footnotes-

n8. Goldman, supra note 3, at 299.

-End Footnotes-

These suppositions may account for how the use of the ABA became institutionalized under Eisenhower (p. 137). What better way to build in the firmness of command structure, yet preserve for the commander the option of selecting a candidate not of a senator's choosing, than to bring in an institution akin to the Army's personnel boards? Eisenhower, having directed an Allied coalition, had an understanding of coalition politics. While the Senate was Republican during his first two years, Eisenhower then had to deal with a coalition of southern Democrats and Republicans from 1954 until 1958, when an economic downturn prompted the election of seventeen new Democratic senators, including many liberals (p. 110). Eisenhower's Justice Department was aggressive in giving its commander-in-chief the flexibility of choice he desired even if it meant stepping on the toes of GOP Senators. Republican minority leader Everett Dirksen held up and even killed Eisenhower nominations if he felt that Republican senators were not given their due. Democratic majority leader Johnson once briefly held up all action on nominations until the Republican National Committee included one candidate desired by Johnson on the list of nominees. n9

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n9. Pp. 133-34. Contrast this to Senator Wiley's demand for half the benches in 1946, discussed above.

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Goldman misses some opportunities in this section. Although he notes Ike's interest in appointing Catholics as tied to party-building (p. 116) he does not consider that side of Eisenhower's persona as a master of coalition management that made this a natural decision for the military man now come to politics. n10 While the appointment of William Brennan is presented with some context and detail, the appointment of California Governor Earl Warren as Chief Justice just nine months into Eisenhower's term is just stated and passed over without discussion (p. 109-10). There is no consideration of the political motives or how it impacted Eisenhower's relation to the Senate in making selections for the lower courts. [\*1587] This may have been outside the author's scope, but it is something to pause and think about. Finally, although the "blue slip" was invented in the Eisenhower era, there is no mention of it in this chapter. n11

- - - - -Footnotes- - - - -

n10. This may account for his appointment of William Brennan to the Supreme Court. P. 152.

n11. See Abraham, *supra* note 5, at 23-24; Edwards & Wayne, *supra* note 5, at 348.

- - - - -End Footnotes- - - - -

In May 1958, after five years in office, Eisenhower expressed uncertainty about the proper role of courts in a democracy. He sent Attorney General William Rogers a lengthy memo asking probing questions about the courts, legislation by the courts versus decision making, the federal-state relationship, and the limits to Congress's control over the courts (p. 125). Rogers responded with a comprehensive seven-page, single-spaced letter explaining the proper role of the courts in reviewing legislation, the use of phrases such as "due process" and "equal protection" in our constitutional framework, the use of judicial

legislating both as an accurate and as an oversimplified criticism, and the need for the judiciary, despite the occasional error, to be independent so that the integrity of the decisional process could be maintained (pp. 125-26). This remarkable exchange reflects well on both Eisenhower and Rogers as they tried to come to a common understanding so that the man who led the free world would know what one third of his government was about.

This same concern led Eisenhower to inquire about the propriety of a recess appointment. n12 Upon being assured by his Attorney General that the power could be properly exercised, he did so with dispatch (pp. 119-20). In choosing his judges Eisenhower displayed a remarkable lack of ideology. One of his appointees, Judge John Minor Wisdom, described Eisenhower's style in recruiting and screening judges as follows: "There is no cataloguing of biases or prejudices .... Instead, what is of concern is whether the man is a qualified lawyer, knowledgeable, has community standing and judicial temperament" (p. 124).

- - - - -Footnotes- - - - -

n12. "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, 2, cl. 3.

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Eisenhower's record of appointments differed significantly from his predecessors. Over 70% of Ike's first-term judges came from private practice compared to 26% for Truman. In his second term, Eisenhower chose 56% from private practice. One third of the first group and one-half of the second came from medium-to-large firms, including many prominent firms. By contrast, none of Truman's first-term appointees came from such firms. Ike appointed no law professors and, unlike Truman and Roosevelt, no sitting member of Congress. About 60% of his judges had records of prominent party activism (p. 151). However, perhaps because of the criteria mentioned by Judge Wisdom, none of Eisenhower's nominees was rejected by a vote of the full Senate (p. 152).

#### Kennedy

While John Kennedy undoubtedly had an interest in judicial selection there are no memos or notes that document his involvement (p. 158). It appears matters were handled by phone or at lunch with his brother, the Attorney General, and others with whom he had close ties. Robert Kennedy said that the President became actively involved only in about a half-dozen situations where members of Congress wanted someone other than the prospective nominee (p. 159). Like Truman before him and Johnson afterward, Kennedy came from the Senate and senators of the President's party therefore exerted great influence over the selection process (p. 173). Professor Goldman states that no mention of a role for the DNC in judicial selection is found in Kennedy's papers (p. 174). Kennedy continued to utilize the ABA in screening as had Eisenhower. However, when the ABA lobbied for bipartisan (half-and-half) selection, Robert Kennedy thanked it for its evaluative role and stated that Republicans would be appointed but in no particular percentage (pp. 177-78).

Although Kennedy faced a Congress dominated by conservative southern Democrats, he was just as cognizant as Truman and Eisenhower that one hand washes the other. Kennedy therefore appointed some Republicans, including three recess appointments left over from Eisenhower. n13 His approach was to arrange packages with Democratic and Republican nominees to gain support across party lines. A total of eleven Republicans were named in the three years of the Kennedy Administration (p. 190). In comparison, only nine Democrats were named in Eisenhower's eight years (p. 148) and these were often southern "Eisenhower" Democrats (p. 151).

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n13. Two of these recess appointees were confirmed. The one not confirmed was JFK's only nominee to be defeated (p. 187 & n.hh) and he was subsequently nominated by Nixon and confirmed by a still-Democratic Senate (pp. 174-75).

-----End Footnotes-----

Shortly after Kennedy took office, seventy-three new judgeships were created. In a presidential first, Kennedy pledged to appoint "men and women of unquestioned ability." n14 The majority of these appointees came from private law practice. Many were from large firms. Only 1.7% of Kennedy and Johnson nominees were solo practitioners although during those years 35% of the nation's lawyers practiced solo (p. 193). Kennedy strove for quality appointments and largely succeeded (p. 196). In only one instance did Kennedy knowingly appoint a segregationist to a circuit court, and [\*1589] this was after a two-and-one-half-year fight over an Arkansas seat on the Eighth Circuit (p. 168). He did, however, appoint persons with public records of racist statements to district courts (p. 167). Overall ideological orientation was less important than whether segregationist positions would be taken from the bench (p. 170).

-----Footnotes-----

n14. However, he only appointed one woman, Sarah Hughes of Texas. P. 180.

-----End Footnotes-----

Goldman's account of Kennedy's administration is weak in his treatment of Kennedy's use of recess appointments, which he used to put Thurgood Marshall on the Second Circuit Court of Appeals. The device of a recess appointment apparently was intended to give some political cover to Judiciary Committee Chairman James Eastland of Mississippi, who, according to Robert Kennedy, delayed appointments but never caused any trouble (p. 183). There is a lot that is not said in this nonstatement of noninterference. The Kennedys and Eastland were not strangers to politics. If, as chairman, Senator Eastland was not causing trouble for a more diverse class of nominees, then what were the considerations given him in exchange? Goldman does not explore the subject. Given the Kennedy penchant for packaging nominees, it is just as easy to package other commodities - a dam or an air base or a highway bill for a judge. How these nonjudicial matters fit into the selection process should not be discounted.

Johnson

Like his mentor Roosevelt, former Senate majority leader Lyndon Johnson

micromanaged judicial selection (p. 160). He appointed more law professors (five) than Truman, Eisenhower and Kennedy combined (p. 194). However, Goldman does not explore the reason behind this statistic. Was it a reflection of a Rooseveltian streak in LBJ, or his own career as a teacher, or attachments between these academics and Democratic politicians? We are left to wonder at its meaning.

But we do not have to wonder at the meaning of one of Goldman's other observations. After the passage of civil rights legislation, LBJ insisted on knowing the civil rights views of candidates for the judiciary (p. 170). Purely personal views were not a bar to appointment, however. Several judges were nominated over the objections of civil rights leaders (pp. 170-71). Local ABA committees frequently found these nominees to be well-qualified, and the backing of powerful southern senators whose votes were needed on other matters led to the usual dealmaking. On June 13, 1967, Johnson named Solicitor General Thurgood Marshall to the Supreme Court (p. 171 n.v). For the nation's black leaders this more than made up for his acceding to the requests of southern senators on other appointments.

[\*1590] In 1966, forty-five new judgeships were created and in 1968, nine new appeals court positions were established (p. 180). The judiciary was expanding as the federal government's role in the life of the nation expanded and as the Congress put more responsibility on the courts in sustaining that role. This expansion gave the former Senate majority leader in the White House more pieces with which to play. He accommodated senators where he could on nominations and expected assistance in return on needed legislation. n15 Using this approach, Johnson named nine more Republicans to the federal courts for a total of twenty in the Kennedy-Johnson era. This was more than twice the number of Democrats named in Eisenhower's two terms (p. 195) and reflects how the two senator-presidents grasped the relationship between cooperation and legislation.

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n15. This approach can be readily seen in Johnson's working with Republican leader Senator Everett Dirksen to name judges Dirksen desired. P. 173.

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Several runners-up for judgeships in the Kennedy-Johnson years were subsequently nominated by Nixon. Johnson had four nominations lapse at the end of his last Congress. He renominated all four after Nixon was elected in November in the belief that Nixon would defer to him in the same way that JFK deferred to Eisenhower. Nixon, however, withdrew the nominations. Nevertheless, of the four, one was again nominated by Nixon, another by Ford, and a third by Carter, and all were confirmed (pp. 187 n.hh).

Nixon

Richard Nixon, the first attorney to serve as President since Franklin Roosevelt, faced a Democratic Senate during his entire presidency. In 1968, opposed by Humphrey on the left and Wallace on the right, Nixon made a campaign promise to name strict constructionists to the courts (p. 198). Within a short time after his election he was able to replace Earl Warren with Warren Burger and to stage-manage the resignation of Abe Fortas from the Supreme Court (p.

198). Although the Fortas issue is barely touched in this book, the Fortas-Haynsworth-Carswell confirmation battles placed the Supreme Court nomination selection process squarely on the front burner of American politics, where it remains to this day.

While Nixon seemed intensely interested in the political ramifications of Supreme Court appointments, he took little or no cognizance of the lower federal courts and the impact that individual nominees would have on either the law or politics. Nixon was more concerned with issues of grand strategy in both global and domestic affairs and was bored by the details of implementation (p. 200). [\*1591] Nominations for the lower federal courts were left up to the Attorney General John Mitchell, the Justice Department and more particularly to John Ehrlichman, assistant to the President for domestic affairs (pp. 202-03). At the outset of his term Nixon gave the ABA a de facto veto over nominations by agreeing that no one would be nominated whom the ABA rated "not qualified" (p. 231). Goldman infers that Nixon and Mitchell - with their Wall Street experience - believed that the ABA shared their conservative Republican values (pp. 214-15).

There are two interesting aspects of Nixon's lower court selections. The first is that he named six African Americans to federal district court benches. While the politics involved in each individual nomination is fascinating, it is even more interesting to follow the memos of White House aides as they discuss how to broaden their appeal to blacks without damaging the Nixon "southern strategy" (pp. 222-25).

The second remarkable feature of Nixon's appointments is the lack of any concerted Democratic effort in the Senate to frustrate them. This could be seen most clearly as Nixon's presidency drew to its close. The House was readying to vote on articles of impeachment and the Senate was preparing for the trial that would follow. Yet, as August 1974 opened, only one of Nixon's judicial appointees was awaiting action in the Senate Judiciary Committee. On August 8, 1974, Richard Nixon nominated three more federal judges. The next day he resigned. All four of his remaining nominees (two district judges and two appellate judges) were confirmed by a Democrat-dominated Senate (p. 226).

#### Ford

Perhaps because of the brevity of Ford's presidency, Goldman discusses his judicial nominations in tandem with Nixon's. This approach makes some sense. The demographics, personal background, and ABA and RNC involvement are similar. But it is appropriate to think of Ford's choices separately. From the beginning, Ford attempted to make a break from the style and substance of Nixon's approach by changing the type of persons who made the screening and vetting decisions at the Justice Department. He tried to restore public faith in a department once headed by the disgraced Mitchell and Kleindienst by bringing in Edward Levi of the University of Chicago as Attorney General and U.S. District Judge Harold Tyler as his deputy (p. 204). This difference in the leadership at Justice may account for the fact that there was no change in the demographic background from Nixon to Ford appointees, but that there was a change in professional experience and party affiliation. Ford relied much more heavily than Nixon on appointees who [\*1592] came with previous judicial experience or from prosecutorial ranks. Likewise, and perhaps because of his legislative leadership experience, he was more open to the appointment of persons identified as Democrats than Nixon had been (pp. 204-05, 226-29). A number of the Democrats came with

strong Republican senatorial support or as part of a package that included Republican nominees (p. 213).

Nevertheless, Ford worked closely with party leaders on lower court nominations. Besides consulting with any affected Republican senators, he routinely submitted names to the Republican National Committee for clearance. Where there were no GOP senators, he consulted with the state party leaders and elected officials before acting on nominations (p. 212). His term was too brief for anyone to venture a guess as to Ford's management or personnel style with regard to judicial nominees. At the end of the Nixon- Ford years, however, a judiciary consisting of 70% Democratic nominees in 1969 was more than half Republican when Jimmy Carter came to town (p. 235).

#### Carter

For a nonlawyer, President Jimmy Carter displayed a remarkable interest and involvement in judicial selection. It may have been his passion for reform and his engineer-driven desire for regular order or his tenure in the Georgia Senate and Statehouse. An opponent of patronage, Carter pledged himself to the selection of judges based solely on professional qualifications (p. 238). Carter's interest lay in the process of selection more than the individuals selected. Carter was serious about removing patronage and to that end established a Circuit Judge Nominating Commission by executive order barely four weeks into his term (p. 238). The commission had a panel from each circuit. The panels had mixed membership of race and gender and were evenly divided between lawyers and nonlawyers. The order charged the panels with the task of giving the president the names of five qualified persons for a court of appeals seat within sixty days of being notified of a vacancy. The President-elect and Attorney General-designate Griffin Bell had met with Senate Judiciary Committee Chairman James O. Eastland in December to discuss changes in judicial selection. Eastland had tried to hold firm on senatorial prerogatives but had agreed to help Carter persuade senators to establish merit selection commissions in their states for district court appointments. He agreed to a nominating commission for the courts of appeal. Before this time only two states had such nominating commissions. By 1980 there would be thirty. n16

#### -Footnotes-

n16. Pp. 244, 283. In the Reagan years the nominating commission was disbanded. Pp. 290-91.

#### -End Footnotes-

[\*1593] Carter's approach dramatically opened the process to scrutiny and eventually produced a broader spectrum of judges to include women and minorities and reduced the institutional influence of the ABA, while at the same time professionalizing the federal judiciary without undermining the quality of nominees by emphasizing nominees with proven judicial experience (pp. 276-81). Carter took a real interest in how the names came to his desk. The memos from White House counsel to the President and from the Attorney General to the President are annotated with handwritten comments by Carter. Some approve an arrangement. Others make subtle but significant changes in the order of the process, with the most significant ones providing that names being considered will come to the President before going out for ABA and FBI checks (pp. 244-45).

The most intriguing reading in the Carter chapter concerns the war between the White House staff and Attorney General Griffin Bell over who would control selection (pp. 246-49, 254-59). Bell fought unsuccessfully to keep that control entirely within his hands. Finally, an uneasy truce was made in which control was shared. Bell insisted, however, that only the White House counsel himself would have input and not his assistants. It would probably have been less contentious had the Attorney General recognized the very high priority the President had given to recruiting qualified women and minorities and had taken steps himself to implement that goal in the early months of the administration. When names of qualified minority and women nominees did not appear in the first year, Carter was heavily criticized in the press and by supporters. His staff reacted by wresting control from the Attorney General, whose performance they felt had subjected their chief to attack.

Carter's great opportunity both to reform the process and to transform the makeup of the courts came from the Omnibus Judgeship Act of 1978 (pp. 241-44). Reflecting the increasing federal court docket and the federalization of much of the criminal law, Congress created 117 new federal trial judges and thirty-five new appellate judges. The numbers alone meant that there would be room both for senators and representatives to try to accommodate patronage needs and for the President to put minorities and women on the federal bench.

Carter largely achieved his process-oriented objectives. True to his word on patronage, for example, he did not appoint any close friends to the bench. Goldman observes that Carter had no personal agenda and there is no evidence that he even suggested a possible judicial candidate for any vacancy (p. 260). As to party considerations, the Attorney General stopped references to a nominee's political affiliations in April 1978 and Carter himself never submitted any of his nominations to the Democratic National Com [\*1594] mittee for clearance (p. 264). This measure of openness was reflected in the Senate where, beginning in 1979 with Senator Kennedy assuming the Judiciary Committee chairmanship, blue slips could no longer be used to block action on a nomination. Every nomination would be considered, and a home-state senator's dissatisfaction was now just another factor for the committee to consider (p. 263). Candidate Ronald Reagan promised to continue Carter's progress and to seek out women for appointment to the federal courts to achieve "a better balance" (p. 284).

#### Reagan

Ronald Reagan, like Carter a former governor, was as detached from the selection process as Carter had been involved. But the Reagan Administration came to Washington with a firm grasp on its political ideology and its underlying belief system. This ideology would guide judicial appointments. Unlike the Carter administration, implementation under Reagan was not overseen by the President, but by Attorney General William French Smith, presidential counselor Edwin Meese III, and White House counsel Fred Fielding (pp. 286-91). They abolished the commission approach of the Carter years but insisted that three to five names be submitted to the White House for each vacancy to give them more flexibility (p. 290). An Office of Legal Policy was created at the Justice Department, headed by an Assistant Attorney General. The office became the clearinghouse for judicial nominations. A special counsel for judicial selection was also created. These officers, the AG, and the White House officials became the "Working Group on Appointments" chaired by Fielding. They institutionalized a formal and active role for the White House in the process (pp. 291-92). As in every

administration before and since, they set about to appoint judges of like mind with the chief executive.

Reagan's process differed from Carter's approach in two marked respects. First, otherwise qualified persons would not be considered unless they shared the administration's judicial philosophy (p. 290). Second, the Reagan Administration abandoned the merit selection vehicles put in place, which were ironically similar to those Reagan himself had used as California's governor (pp. 287, 289).

The importance of the Working Group and its interview process (pp. 303-05) cannot be overemphasized. To a degree not seen before, Reagan turned the selection process over to these subordinates and particularly to his longtime friend Ed Meese (pp. 291, 299-302). The Working Group made judicial appointments a part of the president's domestic policy. Reagan made phone calls to those who were selected asking them to serve - a technique that [\*1595] was not only flattering, but certain to reinforce to the appointee that he was a Reagan appointee (p. 294).

There were several bumps on this road to staffing the courts. The most notable concerned the conflict between Reagan's campaign commitment to appoint women and the desire of the conservatives for ideological purity. Female appointees were automatically suspect because of equal rights and abortion issues. This conflict came to a head with the recommendation to appoint the general counsel of Hallmark, Judith Whittaker, as a federal judge in Missouri (pp. 299, 320, 330-33). Whittaker had taken no position on abortion or other political issues, but she was thought to support the Equal Rights Amendment. Despite high marks from the ABA, the support of prominent Missouri Republicans, and her own GOP bona fides, her perceived support for the ERA was enough to foment a right-wing attack. Iowa Lieutenant Governor Terry Branstad and party activist and fundraiser Richard Viguerie labeled her a Democrat and pro-abortionist. The power of unfounded smears by attackers who did not know their victim was quickly apparent. Meese led the Working Group to conclude that the Whittaker nomination should be dropped because she lacked, as a perplexed deputy attorney general explained, "broad-based support" (p. 333).

Even with the Senate firmly in Republican hands, not all Reagan nominees were confirmed. Jefferson Sessions III was named to a federal bench in Alabama, but ran into trouble on civil rights issues; even after four hearings, the nomination could not be saved. n17

-Footnotes-

n17. Pp. 308-09. He is now a United States Senator and a member of the committee that rejected him. The author does not tell us if this is a first, but in today's climate it may become an increasingly attractive option for unsuccessful nominees.

-End Footnotes-

When Reagan's administration encountered opposition to a nomination it truly desired, it was willing to push. Two examples are the eventually successful fights to confirm Dan Manion to the Seventh Circuit and Alex Kozinski to the Ninth (pp. 309-14). In another unusual confirmation struggle with a Republican senator in a Republican-controlled Senate, the administration found its choice

for the Eighth Circuit blocked by South Dakota's James Abdnor. Senator Abdnor was trying to end a twenty-two-year drought for his state on that court. Unable to persuade Abdnor, the Republican leadership changed the rules in midsession so that a senator could no longer place a "hold" on a judicial nominee from another state (pp. 321-22). That change occurred in 1983. Today, the Republican-controlled Senate has gone back to its old custom allowing cross-state blockage.

[\*1596] Reagan's efforts were remarkably successful in aiding him to reshape the lower federal courts. He appointed a record seventy-eight appellate and 290 district judges. Like Carter he was helped by a judgeship bill that created eighty-five new judges and by a Senate that was in friendly hands for six of his eight years. Also like Carter he kept the ABA at arm's length and like Roosevelt he tried to make his judicial appointments an extension of his domestic policy. He was aided by a staff who understood this purpose and enthusiastically backed its implementation. Reagan, like FDR, wanted to reshape the courts not to reflect his vision but to share it and, like his onetime hero, he did it. But, like every president from Washington to Clinton and beyond, Reagan's success waxed and waned. Not simply because other presidents and Senates come after him, but because the thing that he leaves as a legacy - an independent judiciary - will itself change as the issues of each new day come before it and seek answers to questions previously unasked.

#### Conclusion

This is an eye-opening book about a process that has been in place virtually out of sight since the beginning of the Republic and which, on balance, has worked rather well. There seems to be a natural ebb and flow with the checks-and-balances-system of the framers preventing any party, no matter how long it dominates the executive or the legislative branches, from dominating the third branch. This will comfort those in either party who have feared otherwise.

The system has worked well in modern times except for the breakdown in the Truman years and the analogous situation today to which Goldman alludes in his summing up (pp. 364-65). Both political reality and pressure from a citizenry that rejects the notion that the courts are merely another political branch have served to protect the judiciary from ideologues of the left and the right. The historical overview of the process also demonstrates the wisdom of a cardinal rule of practical politics, "Never create or assert an official prerogative that could not be safely entrusted to your adversaries." n18

- - - - -Footnotes- - - - -

n18. Bruce Fein, *The Chief Justice vs. Hatch*, Wash. Times, Jan. 6, 1998, at A12. Bruce Fein was assistant attorney general in the Reagan administration.

- - - - -End Footnotes- - - - -

Goldman has produced a comprehensive, well-organized and crisply written research work with excellent tables for any scholar or student of the American judiciary. It ends in 1988 and leaves the reader eager to know how Presidents Bush and Clinton handled [\*1597] judicial selection. I hope I will have the opportunity to review the sequel.

I can just imagine how the book will start. Professor Goldman will refer to his previous book and the fact that it covered a span of fifty-five years and seven presidents. He will remark on the smooth transitions that occurred when two of these presidents died and a third resigned, each to be replaced by a man very different than the president the country had elected. He will say that for nearly two hundred years the process worked reasonably well.

And then he must begin to write about the unprecedented crisis that we are only now beginning to understand. He will write about a group of men who, having had the unfettered power to select federal judges during the Reagan years, tried to cling to that power during the Bush years. Further frustrated by the election of Clinton, they viewed the 1994 election of the Republican senate as their private restoration to presidential power. In what may one day prove to be the biggest constitutional scandal of the Clinton era, this unprecedented shadow government of former Republican officials appears to have conspired with current officeholders to disrupt the entire judicial nomination process. In short, they were captured for posterity on their own videotape trading blackballs for contributions. n19

- - - - -Footnotes- - - - -

n19. See Judicial Selection Monitoring Project, videotape and prospectus accompanying letter from Robert H. Bork, Sept. 9, 1997 (on file with author) (representing contributions to JSMP as tax-deductible); Judicial Selection Monitoring Project, Memorandum of Commitment to Paul Weyrich (same) (on file with author). See also Weinstein, *supra* note 2.

- - - - -End Footnotes- - - - -

The book may have a footnote about the nominee who exposed the shocking tape. It will be interesting to learn what became of him.

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SYMPOSIUM: REPRESENTING RACE: LYNCHING ETHICS: TOWARD A THEORY OF RACIALIZED DEFENSES

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#### SUMMARY:

... In this article, I take up the cause of Henry Hays, James Knowles, and Frank Cox, the cause of the Ku Klux Klan and other agents of racial violence in American history. ... The purpose of this long-term project is to understand the status of race, racialized defense strategy, and race-neutral representation in the law and ethics of criminal defense lawyering. ... Furthermore, she condemned the underlying interpretive analysis of the Williams-Watson trial record for mistakenly entangling social and legal strands of race-talk, misjudging the harm inflicted upon black racial identity and community, and misconceiving the criminal defense lawyer's duty to advocate on behalf of individual client interests, even when preservation of those interests demands the use of racialized narratives. ... The racialized defense of victim denigration rests on the negation of racial identity in law and culture. ... The norm of reciprocity treats the racialized defenses of jury nullification, victim denigration, and diminished capacity as the efficient, transactional product of lawyer-client value consensus. ... The interpretive and physical violence embodied in the racialized defenses of jury nullification, victim denigration, and diminished capacity extends the instant realm of hate speech regulation to the rhetoric of the courtroom. ... The norm of spirituality completes the ethic of race-conscious responsibility. ...

#### TEXT:

[\*1063]

"I wonder what people would think if they found a nigger hanging on Herndon Avenue." n1

-----Footnotes-----

n1. Record at 1026, State v. Cox, No. CC-87-2143 (Ala. 1987) [hereinafter Record]. Record citations preserve the original text of the trial transcript except where it appears clearly erroneous or ungrammatical.

-----End Footnotes-----

## Introduction

So much depends upon a rope in Mobile, Alabama. To hang Michael Donald, Henry Hays and James "Tiger" Knowles tied up "a piece of nylon rope about twenty feet long, yellow nylon." n2 They borrowed the rope from Frank Cox, Hays's brother-in-law. n3 Cox "went out in the back" of his mother's "boatshed, or something like that, maybe it was in the lodge." n4 He "got a rope," climbed into the front seat of Hays's Buick Wildcat, and handed it to Knowles sitting in the back seat. n5

-----Footnotes-----

n2. Record at 1059-60.

n3. See id. at 1055, 1059.

n4. Id. at 1060.

n5. See id. at 1063-64.

-----End Footnotes-----

So much depends upon a noose. Knowles "made a hangman's noose out of the rope," n6 thirteen loops in the knot, thirteen loops "around" Michael Donald's neck, a "classic hangman's noose." n7 A hangman's noose "needs to be cut and burned right ... so it won't unravel." n8 Both ends of the rope must be "cut off and burned." n9 [\*1064] Tightly "pulled up" and left "swinging," Michael Donald's rope "burned into the bark." n10

-----Footnotes-----

n6. Id. at 1064.

n7. Id. at 742. Morris Dees describes the thirteen loop knot as "standard Klan operating procedure." See Morris Dees & Steve Fiffer, A Season for Justice: The Life and Times of Civil Rights Lawyer Morris Dees 212 (1991).

n8. Record at 1064.

n9. Id. at 1069.

n10. Id. at 742-43.

-----End Footnotes-----

So much depends upon a camphor tree. Hays and Knowles "went out ... driving around looking for someone to kill." n11 In East Mobile, "over around David Avenue," they "came on Michael Donald ... kidnapped him and took him to Baldwin County and killed him, and brought him back to Herndon Avenue and hung him up" in a tree across the street from Hays's home. n12

-Footnotes-

n11. Id. at 1072, 1075.

n12. Id. at 1078-79.

-End Footnotes-

\* \* \*

Early on the morning of March 21, 1981, a man discovered Michael Donald's mutilated body hanging from a camphor tree on the 100 block of Herndon Avenue in Mobile, Alabama. n13 That night, members of the United Klans of America, Alabama Realm, burned a cross on the grounds of the Mobile County Courthouse. n14 An autopsy found that Donald had been beaten, stabbed, strangled, and then "hung up." n15

-Footnotes-

n13. See id. at 461-62.

n14. See Hays v. State, 518 So. 2d 749, 752 (Ala. Crim. App. 1985).

n15. Record at 740-50, 751.

-End Footnotes-

In 1983, a Mobile County grand jury indicted Hays, the Exalted Cyclops of the United Klans of America, for capital murder. n16 At trial, the jury found Hays guilty and recommended life without parole. n17 The trial judge rejected the recommendation of the jury and sentenced Hays to death. n18

-Footnotes-

n16. See Hays, 518 So. 2d at 751-52.

n17. See 518 So. 2d at 751.

n18. See 518 So. 2d at 751.

-End Footnotes-

In 1984, a Mobile County grand jury indicted Cox, also a member of the United Klans of America, for conspiracy to commit murder. n19 After impaneling a jury and convening the trial, the trial judge dismissed the indictment and discharged Cox, citing the Alabama three-year statute of limitations for criminal conspiracy. n20 In 1987, an Alabama grand jury reindicted Cox for

murder. n21 Commenced in 1988, the initial trial of the murder indictment ended in a mistrial. Reconvened in 1989, a second trial resulted in a conviction. n22

- - - - -Footnotes- - - - -

n19. See Cox v. State, 585 So. 2d 182, 185 (Ala. Crim. App. 1991).

n20. See 585 So. 2d at 185.

n21. See 585 So. 2d at 185.

n22. See 585 So. 2d at 185.

- - - - -End Footnotes- - - - -  
[\*1065]

Additionally, in 1985 a federal grand jury indicted Knowles, a third member of the United Klans of America, for violating the civil rights of Michael Donald. n23 Knowles pleaded guilty to civil rights violations in the United States District Court for the Southern District of Alabama. n24 The district court sentenced him to life imprisonment. n25 In return for Knowles's guilty plea and his service as a State witness against Hays, Cox, and other Klansmen, the federal prosecutor recommended that Alabama forego concurrent prosecution of Knowles for capital murder in state court. n26

- - - - -Footnotes- - - - -

n23. See United States v. Knowle, No. CR83-00028 (S.D. Ala. 1986).

n24. See Cox, 585 So. 2d at 185.

n25. See 585 So. 2d at 185.

n26. See 585 So. 2d at 185.

- - - - -End Footnotes- - - - -

In 1984, the Southern Poverty Law Center, n27 acting on behalf of Beulah Mae Donald, the mother of Michael Donald, filed a civil rights action in the United States District Court for the Southern District of Alabama against the United Klans of America, Hays, Knowles, Cox, and two other Klansmen seeking \$ 10 million in damages. n28 In 1987, a jury found the Klan and its members guilty of violating Michael Donald's civil rights and awarded Beulah Mae Donald \$ 7 million in damages. n29

- - - - -Footnotes- - - - -

n27. For an augmented history of the Southern Poverty Law Center, see Morris Dees & Steve Fiffer, *Hate on Trial: The Case Against America's Most Dangerous Neo-Nazi* (1993).

n28. See Dees & Fiffer, *supra* note 7, at 222; see also Bill Stanton, *Klanwatch: Bringing the Ku Klux Klan to Justice* 191-249 (1991).

n29. See Dees & Fiffer, *supra* note 7, at 330-31.

- - - - -End Footnotes- - - - -

In this article, I take up the cause of Henry Hays, James Knowles, and Frank Cox, the cause of the Ku Klux Klan and other agents of racial violence in American history. I come to their cause not out of sympathy but in pursuit of a larger project devoted to the historical study of race, lawyers, and ethics in the American criminal justice system. Provoked by the jurisprudence of critical race theory ("CRT"), n30 the project investigates the rhetoric of race or "race-talk" in criminal defense advocacy and ethics within the context of racially motivated private violence. n31 The purpose of this long-term project is to understand the status of race, racialized defense strategy, and race-neutral representation in the law and ethics [\*1066] of criminal defense lawyering. Out of this understanding, I hope, will come a general theory of racialized defenses grounded in the normative ideals of moral community.

- - - - -Footnotes- - - - -

n30. See, e.g., *Critical Race Theory: The Key Writings that Formed the Movement* (Kimberle Crenshaw et al. eds., 1995); *Critical Race Theory: The Cutting Edge* (Richard Delgado ed., 1995); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 Va. L. Rev. 461 (1993); Symposium, *Critical Race Theory*, 82 Cal. L. Rev. 741 (1994).

n31. For discussion of the public-private distinction in the setting of racial violence, see *infra* notes 188-93 and accompanying text.

- - - - -End Footnotes- - - - -

In a prior work, I searched the rhetoric of race in cases of racially motivated black-on-white private violence by focusing on the 1993 trial of Damian Williams and Henry Watson in Los Angeles County Superior Court on charges of attempted murder and aggravated mayhem, stemming from the beating of Reginald Denny and seven others during the South Central Los Angeles riots of 1992. n32 Close inspection of the Williams-Watson trial record suggests that the rhetorical structure of criminal defense stories of black-on-white racial violence incorporates competing narratives of deviance and defiance that engraft an essentialist dichotomy of good-bad moral character on the racial identity of young black men. n33 The distillation of male racial identity into objective, universal categories of black manhood distorts the meaning of racial identity and the image of racial community. n34 Moreover, the tendency of criminal defense lawyers to privilege deviance narratives and to subordinate defiance narratives in storytelling magnifies that distortion, inscribing the mark of bestial pathology into the texture of racial identity and community. The American Bar Association's Model Rules of Professional Conduct and Model Code of Professional Responsibility n35 countenance such deformity by allowing racialized or color-coded criminal defense strategies to survive unregulated under neutral accounts of liberal contractarian and communitarian legal theory. n36

- - - - -Footnotes- - - - -

n32. See Anthony V. Alfieri, *Defending Racial Violence*, 95 Colum. L. Rev. 1301 (1995).

n33. See *id.* at 1304, 1309.

n34. See Anthony V. Alfieri, *Race-ing Legal Ethics*, 96 Colum. L. Rev. 800, 801 (1996).

n35. See Model Rules of Professional Conduct (1995); Model Code of Professional Responsibility (1980).

n36. See Alfieri, *supra* note 34, at 801; see also Alfieri, *supra* note 32, at 1320.

- - - - -End Footnotes- - - - -

Calling for remedial regulation in racialized contexts such as the Williams-Watson trial, I proposed an alternative ethic of professional responsibility animated by principles of race consciousness, contingency, and collectivity. n37 A strong version of this alternative ethic directs criminal defense lawyers to reject the use of deviance-based racialized strategies unless such strategies are necessary to frustrate, by means of jury nullification, a racially discriminatory prosecution. n38 A weak version entreats defense lawyers to join [\*1067] their clients in collaborative deliberation over the meaning of racial identity and injury within a counseling dialogue devoted to moral character and community integrity. n39

- - - - -Footnotes- - - - -

n37. See Alfieri, *supra* note 34, at 802; see also Alfieri, *supra* note 32, at 1340.

n38. See Alfieri, *supra* note 34, at 802.

n39. See *id.*

- - - - -End Footnotes- - - - -

Unsurprisingly, these remedial prescriptions sparked swift and acute criticism. n40 Robin Barnes, for example, denounced the remedial scheme as unprecedented, unworkable, and likely unconstitutional. n41 Furthermore, she condemned the underlying interpretive analysis of the Williams-Watson trial record for mistakenly entangling social and legal strands of race-talk, misjudging the harm inflicted upon black racial identity and community, and misconceiving the criminal defense lawyer's duty to advocate on behalf of individual client interests, even when preservation of those interests demands the use of racialized narratives. n42 For Barnes, the eradication of racial prejudice from the criminal justice system necessitates a regime of legal neutrality, not a regime of race-conscious ethics rules. n43

- - - - -Footnotes- - - - -

n40. See Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 Colum. L. Rev. 788 (1996); David B. Wilkins, *Race, Ethics, and the First Amendment*, 63 Geo. Wash. L. Rev. 1030, 1069-70 n.183 (1995).

n41. See Barnes, *supra* note 40, at 789-90, 792.

n42. See *id.* at 789-93.

n43. See *id.* at 791, 794.

- - - - -End Footnotes- - - - -

Grand intentions notwithstanding, Barnes's dedication to neutrality consigns to folly her campaign aimed at purging the criminal justice system of racial prejudice. In the context of racial violence and racialized legal discourse, neutrality is not merely elusive, it is largely untenable. Broadly or narrowly construed, the color-coded rhetoric of legal discourse affords little chance of or room for neutral speech on matters of racial significance. Moreover, dedication to neutrality accepts the harms of racial injury as inevitable and, worse, unremarkable. That the harms are suffered by the victims and agents of racial violence, as well as by their cohort communities, seems of no moment to Barnes.

The threshold premise of this article, and its allied research, is the recognition and condemnation of racial injury within the distinct, though sometimes overlapping, borders of public and private violence. The instant turn to racial rhetoric in the circumstance of white-on-black private violence, specifically in the case of lynching, strains that border distinction. Gauged by any measure, the political violence of lynching seems to override the public-private distinction commonly posited by legal advocates and adjudicators. Yet [\*1068] here, tailored carefully to the facts presented in the case of Michael Donald, the distinction seems to hold and, equally important, to prove rhetorically and morally instructive.

The enormous breadth of the subject of lynching in America, spanning two centuries and crossing interdisciplinary boundaries, coupled with a scarcity of archival court collections, especially trial records, dictates a somewhat improvisational initial approach to the rhetoric of lynching cases. n44 The starting point, staked out in this introductory article, is an effort to map competing theories of racialized defenses arising out of lynching prosecutions. Building on this effort, the next article will survey the varied forms of racialized defenses fashioned against lynching prosecutions. A third article will chart the development of racialized defenses in lynching-related civil rights actions. Together, the articles will lay the groundwork for a fuller account of the history of racialized defenses in American criminal and civil rights law.

- - - - -Footnotes- - - - -

n44. A comprehensive search for archival court records requires the wide-ranging review of state and county court documents. Two library collections provide useful aid in organizing such a search: the Papers of the National Association for the Advancement of Colored People, Library of Congress, Manuscript Division, Washington, D.C.; and the News Clippings File of the Tuskegee Institute, Hollis Burke Frissell Library, Tuskegee, Alabama.

- - - - -End Footnotes- - - - -

To the extent that it assumes a theory-driven posture toward sociolegal practice, the instant approach will doubtless stir protest. Detecting an "impatience to theorize," n45 some may condemn the approach for privileging abstract theoretical design over contextualized reflection. n46 To be sure, epistemological hierarchy of any sort warrants careful scrutiny. The hazards of error and misreading are always great. But the same hazards attend anthropological, n47 interpretive, n48 and empirical n49 investigations. No methodology is with- [\*1069] out peril. Although broad, the project advanced here strives for a contextual account of the law of criminal lawyering and ethics in the hope of capturing some sense of the theory and practice of racial violence in American legal history.

- - - - -Footnotes- - - - -

n45. Lucie White, Paradox, Piece-Work, and Patience, 43 Hastings L.J. 853, 859 (1992).

n46. See id.; see also Peter A. Joy, Clinical Scholarship: Improving the Practice of Law, 2 Clinical L. Rev. 385, 402-04 (1996); Cathy Lesser Mansfield, Deconstructing Reconstructive Poverty Law: A Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement, 61 Brook. L. Rev. 889 (1995).

n47. See Clifford Geertz, After the Fact: Two Countries, Four Decades, One Anthropologist 96-135 (1995); Peter Just, History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law, 26 Law & Socy. Rev. 373 (1992) (review essay); Annelise Riles, Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity, 1994 U. Ill. L. Rev. 597.

n48. See Patricia Ewick & Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative, 29 Law & Socy. Rev. 197 (1995); Diane Reay, Insider Perspectives or Stealing the Words out of Women's Mouths: Interpretation in the Research Process, 53 Feminist Rev. 57 (1996).

n49. See Austin Sarat, Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-empiricist Sociology of Law, 15 Law & Soc. Inquiry 155 (1990); David M. Trubek & John Esser, "Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?, 14 Law & Soc. Inquiry 3 (1989).

- - - - -End Footnotes- - - - -

The article is divided into four parts. Part I describes the narrative form and racialized substance of lynching defenses. Part II examines rival theories of lynching defenses, notably jury nullification, victim denigration, and diminished capacity. Part III analyzes alternative ethical justifications of lynching defenses under modern and postmodern visions of jurisprudence. Part IV proposes a reconstructed ethic of lynching defenses informed by the norms of virtue, citizenship, race consciousness, and spirituality.

:

## I. Lynching Histories

The lynching of Michael Donald at the hands of the Ku Klux Klan sounds themes echoed throughout the history of lynching in America: difference, hate, violence, and community. n50 Plainly, a full account of that history, and of the place of the Klan in its progress, n51 exceeds the scope of this article. The main thrust of this article addresses neither the progress nor the prosecution of lynching, n52 but rather the legal defense of racially motivated violence. Symbolic of the physical and interpretive violence of race, lynching and its legal defense raise issues common to the postmodern study of law and the politics of difference, n53 especially the contested politics of the racial trial. n54 The legal defense of lynching, for example, involves the identity-making function of legal narrative, n55 the social construction of race, n56 and the culture and cognitive psychology of bias. n57

-----Footnotes-----

n50. On the history of American lynching, see Jesse D. Ames, *The Changing Character of Lynching* (1942); James E. Cutler, *Lynch-Law: An Investigation into the History of Lynching in the United States* (1905); Walter White, *Rope & Faggot: A Biography of Judge Lynch* (1929); Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* (1980).

n51. Historians divide the evolution of the Ku Klux Klan into three periods corresponding to the late nineteenth century Reconstruction-era, the post-World War I era of the 1920s, and the post-World War II era of the civil rights movement. For Reconstruction-era histories, see David M. Chalmers, *Hooded Americanism: The First Century of the Ku Klux Klan 1865-1965* (1987); Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (1971); Wyn Craig Wade, *The Fiery Cross: The Ku Klux Klan in America* 31-116 (1987).

On the revival of the Klan in the 1920s, see Kathleen M. Blee, *Women of the Klan: Racism and Gender in the 1920s* (1991); Nancy Maclean, *Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan* (1994).

On the rise of the modern Klan in the post-World War II and civil rights-era, see David H. Bennett, *The Party of Fear: The American Far Right from Nativism to the Militia Movement* 273-331 (1995); Patsy Sims, *The Klan* (1978).

n52. For a review of lynching prosecutions, see James H. Chadbourn, *Lynching and the Law* 13-24 (1933); Everette Swinney, *Suppressing the Ku Klux Klan: The Enforcement of the Reconstruction Amendments 1870-1877*, at 180-204, 316-40 (1987).

n53. On postmodernism and legal practice, see *Lawyers in a Postmodern World: Translation and Transgression* (Maureen Cain & Christine B. Harrington eds., 1994); Anthony V. Alfieri, *Impoverished Practices*, 81 *Geo. L.J.* 2567 (1993).

n54. The literature on political trials is extensive. See, e.g., *Political Trials* (Theodore L. Becker ed., 1971); *American Political Trials* (Michael R. Belknap ed., 1981); Georgia W. Ulmschneider, *Rape and Battered Women's Self-Defense Trials as "Political Trials": New Perspectives on Feminists' Legal Reform Efforts and Traditional "Political Trials" Concepts*, 29 *Suffolk U. L. Rev.* 85 (1995).

n55. See generally Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107 (1991).

n56. See generally Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1 (1994).

n57. See generally Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105 (1989).

- - - - -End Footnotes- - - - -

The product of an apartheid system of rhetorical and spatial dimensions, the American trial court provides the arena for the intersection of law, lawyering, ethics, and race. An important literature explores the role of judges and courts in the history of racial oppression both here n58 and abroad. n59 Curiously, this literature omits sustained treatment of the complicity of lawyers in legitimizing the juridical structures (such as law, legal discourse, and institutional procedure) of racial oppression. n60

- - - - -Footnotes- - - - -

n58. See, e.g., Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 Harv. L. Rev. 513 (1974).

n59. See, e.g., Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992); Martin Chanock, *Criminological Science and the Criminal Law on the Colonial Periphery: Perception, Fantasy, and Realities in South Africa, 1900-1930*, 20 Law & Soc. Inquiry 911 (1995).

n60. Noteworthy exceptions concern lawyer complicity in the Nazi and South African state regimes. See Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 Yale L.J. 1321 (1989); Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 Law & Soc. Inquiry 407 (1995).

- - - - -End Footnotes- - - - -

The emergence of an outsider jurisprudence in the legal academy during the last decade offers a chance to cure this omission. Guided by new voices of color n61 probing the connections of law, race, and identity, n62 the jurisprudence is evolving rapidly under the [\*1071] prodding of CRT, n63 Asian, n64 and LatCrit scholars. n65 The advent of the CRT and fledgling LatCrit movements dislodges the traditionally subordinate position of race and ethnicity in American law and ethics. Thus dislodged, the meaning of color in black, n66 Asian, n67 Latino/a, n68 and Native American n69 advocacy takes on new and unsettled import. This instability enables critical scholars to reassess the written and social texts of the law exhibited in the courtroom. n70 Textual reassessment implicates narrative n71 and discourse theory, n72 and thereby highlights the rhetoric of the criminal trial. n73 Reimagining the rhetoric of racialized advocacy and ethics at trial or in the law office creates transformative opportunities to move [\*1072] legal practice toward an

appreciation of the importance of racial identity and community.

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n61. See Alex M. Johnson, Jr., *The New Voice of Color*, 100 Yale L.J. 2007 (1991).

n62. For studies of racial identity, see Judy Scales-Trent, *Notes of a White Black Woman: Race, Color, Community* (1995); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. Rev. 263 (1995); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law and A Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329 (1991); Francisco Valdez, *Sex and Race in Queer Legal Culture: A Meditation on Identity and Inter-Connectivity*, 5 S. Cal. Rev. L. & Women's Stud. (forthcoming 1996); Mary Coombs, *Interrogating Identity*, 2 Afr.-Am. L. & Poly. Rep. 222 (1995) (book review). See generally *After Identity: A Reader in Law and Culture* (Dan Danielsen & Karen Engle eds., 1995).

n63. See, e.g., Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 Cal. L. Rev. 787 (1994); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 Cal. L. Rev. 741 (1994); Eleanor Marie Brown, *Note, The Tower of Babel: Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship*, 105 Yale L.J. 513 (1995).

n64. See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Cal. L. Rev. 1243 (1993); Jim Chen, *Unloving*, 80 Iowa L. Rev. 145 (1994).

n65. See, e.g., Symposium, *LatCrit Theory: Naming and Launching a New Perspective in Legal Discourse*, 1 Harv. Latino L. Rev. (forthcoming 1996); Symposium, *Latinas/os, LatCrit Theory and the 21st Century*, 85 Cal. L. Rev. (forthcoming 1997).

n66. Compare Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989) with Colloquy: *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 Harv. L. Rev. 1844 (1990).

n67. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. Cal. L. Rev. 1581 (1993).

n68. See Margaret E. Montoya, *Mascaras, Trenzas, Y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 Harv. Women's L.J. 185 (1994).

n69. See Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 Ariz. L. Rev. 237 (1989); Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 Mich. L. Rev. 741 (1997).

n70. See, e.g., Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process - A Critique of the Role of the Public*

Defender and a Proposal for Reform, 32 Am. Crim. L. Rev. 743 (1995); Cara W. Robertson, Representing "Miss Lizzie": Cultural Convictions in the Trial of Lizzie Borden, 8 Yale J.L. & Human. 351 (1996).

n71. See Binny Miller, Give Them Back Their Lives: Recognizing Client Narrative in Case Theory, 93 Mich. L. Rev. 485 (1994); Valorie K. Vojdik, At War: Narrative Tactics in the Citadel and VMI Litigation, 19 Harv. Women's L.J. 1 (1996).

n72. See Clark D. Cunningham, The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse, 77 Cornell L. Rev. 1298 (1992); Herbert A. Eastman, Speaking Truth to Power: The Language of Civil Rights Litigators, 104 Yale L.J. 763 (1995).

n73. For studies of criminal trial rhetoric, see generally Anthony G. Amsterdam & Randy Hertz, An Analysis of Closing Arguments to a Jury, 37 N.Y.L. Sch. L. Rev. 55 (1992); Philip N. Meyer, "Desperate for Love": Cinematic Influences upon a Defendant's Closing Argument to a Jury 18 Vt. L. Rev. 721 (1994).

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Consider the idea of the racialized defense. By racialized, I mean a defense coded, overtly or covertly, in the rhetoric of color. Garnered from interdisciplinary research on race and the criminal law process, n74 judicial reports of racial and ethnic bias in the courtroom, n75 and the writings of CRT n76 and ethics n77 scholars, color-coded claims and defenses pervade the sociolegal discourse of American law, culture, and society. The resurgence of the black rage defense n78 and the emergence of the variegated cultural defense n79 reflects the protean nature of that discourse. Taken together, these defenses illustrate the intertwined character of legal and social discourse about race.

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n74. See generally Coramae R. Mann, Unequal Justice - A Question of Color (1993); Michael Tonry, Malign Neglect - Race, Crime, and Punishment in America (1995).

n75. See, e.g., Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, 73 Or. L. Rev. 823 (1995); Special Committee on Gender to the D.C. Circuit Task Force on Gender, Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias, 84 Geo. L.J. 1657, 1893 (1996). See generally Todd D. Peterson, Studying the Impact of Race and Ethnicity in the Federal Courts, 64 Geo. Wash. L. Rev. 173 (1996).

n76. See Jody D. Armour, Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes, 46 Stan. L. Rev. 781 (1994).

n77. See Eva S. Nilsen, The Criminal Defense Lawyer's Reliance on Bias and Prejudice, 8 Geo. J. Legal Ethics 1 (1994); Andrew E. Taslitz & Sharon Styles-Anderson, Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession, 9 Geo.

J. Legal Ethics 781 (1996).

n78. See Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. Rev. 731 (1996). See generally William H. Grier & Price M. Cobbs, *Black Rage* (1968).

n79. See, e.g., Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. Rev. 36 (1995); Alison D. Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. Cal. Rev. L. & Women's Stud. 437 (1993); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 Harv. Women's L.J. 57 (1994).

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Alluding to this entwined quality, Alan Hunt observes "that legal life and everyday social life are mutually conditioning and constraining and that elements of legal consciousness play an active part in popular consciousness and practices." n80 To Hunt, law "enters into the way that life is imagined, discussed, argued about, and fought over." n81 The act of "imagining, talking, arguing, and fight- [\*1073] ing" in turn "shapes the law." n82 In this way, the racialized organization of law, lawyering, and ethics infects and, conversely, is infected by the racialized composition of popular culture and everyday social life in America. n83 The fusion of racialized legal and social discourse is not simply confined to high-profile cases. n84

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n80. Alan Hunt, *Law, Community, and Everyday Life: Yngvesson's Virtuous Citizens and Disruptive Subjects*, 21 Law & Soc. Inquiry 173, 178-79 (1996) (reviewing Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court* (1993)).

n81. Id. at 179.

n82. Id.

n83. See generally *Race-ing Justice, Engendering Power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality* (Toni Morrison ed., 1992).

n84. See Adeno Addis, *"Hell Man, They Did Invent Us": The Mass Media, Law and African Americans*, 41 Buff. L. Rev. 523 (1993); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. Rev. 965, 967-70 (1995).

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The prominence of the racialized defense in contemporary sociolegal discourse underscores the crucial function of narrative and storytelling in criminal law and lawyering. Dismantling racialized storytelling in a criminal context reveals two core presuppositions that shape the traditional criminal defense paradigm: partisanship and nonaccountability. n85 The precepts of client partisanship and moral nonaccountability spawn discrete rhetorical forms of color-coded narrative. The play of narrative, Rebecca French notes, "breaks

open a discipline by creating new linguistic and representational forms." n86 Here, the focus is on the racialized criminal courtroom, its race-neutral ethical precepts, and its color-coded narrative forms.

-Footnotes-

n85. See Alfieri, *supra* note 32, at 1321.

n86. Rebecca R. French, *Of Narrative in Law and Anthropology*, 30 *Law & Socy. Rev.* 417, 421 (1996) (review essay). Explicating these narrative forms, French remarks:

In this period of late or postmodernism, single-person narrative is viewed as a safe and effective technique both for avoiding false generalizations that might be attacked (the false coherence of essentialist stereotypes) and for creating a new form of social science that includes, instead of dismisses, multiplicity and diversity.

*Id.* at 419; see also Benjamin L. Apt, *Aggadah, Legal Narrative, and the Law*, 73 *Or. L. Rev.* 943, 968 (1995) ("Legal narrative often attempts to expose the shortcomings of current laws and reveal the effect of laws on society.").

-End Footnotes-

The examination of racialized courtroom narratives requires an analysis of hierarchy and status in legal rhetoric. Consider the rhetoric of colorblind constitutionalism. The colorblindness trope n87 is basic to the discourse of American law and jurisprudence. Yet, insofar as it denies the social significance of racial categories, it pre- [\*1074] serves racial hierarchy and status inequality. n88 In this respect, colorblind rhetoric operates as a "status-preserving" n89 discourse.

-Footnotes-

n87. See T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 *Colum. L. Rev.* 1060 (1991); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 *Conn. L. Rev.* 1 (1995).

n88. See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 *Cal. L. Rev.* 733 (1995).

n89. The term belongs to Reva Siegel. See Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 *Yale L.J.* 2117, 2185 (1996).

-End Footnotes-

The law of lawyering which governs the criminal defense of racial violence in lynching cases also constitutes a status-preserving discourse. In practical effect, it protects the racial hierarchy of white dominance and black subordination embedded in the racialized narratives of American law, culture, and society. Within federal and state courtrooms, this status hierarchy

appears legitimate and nondiscriminatory.

This legitimacy rests in part on the rhetoric of colorblindness. Cloaked in this rhetoric, the Model Code and the Model Rules condone the use of racialized narrative in criminal defense advocacy. Construing the law of lawyering as a racial status law and its language as a status-preserving discourse challenges the race-neutral standing of the Model Code and the Model Rules. Central to this challenge is an explanation of precisely how legal rules covertly enforce status privileges "once justified in overtly hierarchy-based discourses, with reference to other, less contested, social values," n90 such as citizenship and community.

-Footnotes-

n90. Id. at 2177.

-End Footnotes-

## II. Lynching Defenses

Lynching defenses embody a distinct narrative form of the racialized defense. This Part considers three varieties of lynching defenses: jury nullification, victim denigration, and diminished capacity. The defenses of jury nullification and victim denigration make overt use of hierarchy-based racial discourse. Nullification rhetoric invokes the power and prerogative of white racial supremacy. Denigration rhetoric conjures up a vision of black racial inferiority where victims are worthy of killing but unworthy of protection or redress. The defense of diminished capacity, by contrast, makes covert use of hierarchical racial discourse through reference to the social values of community and civic virtue. For white lawbreakers, civic commitment lies only to segregated community.

The racial hierarchies encoded in the rhetoric of nullification, denigration, and diminished capacity denote difference in legal and social status. The elaboration of difference follows the logic of adversarial justice, n91 sharply distinguishing and dividing claims of community racial entitlement into oppositional stands. Despite complaints of excess, the model of adversarial justice expressly tolerates deceptive and sometimes false or frivolous claims. n92 Bound up in false hierarchies of natural superiority and inferiority, the narrative signification of racial difference is likewise tolerated.

-Footnotes-

n91. For deft exposition of this logic, see David Luban, *The Adversary System Excuse*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 83 (David Luban ed., 1983); see also Stephen McG. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System?*, 79 Cal. L. Rev. 313 (1991).

n92. See R.J. Gerber, *Victory v. Truth: The Adversary System & Its Ethics*, 19 Ariz. St. L.J. 3 (1987); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403 (1992). Compare Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" To Present a False Case*, 1 Geo. J. Legal Ethics 125 (1987) with John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on*

the Crimina Lawyer's "Different Mission," 1 Geo. J. Legal Ethics 339 (1987).

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The reconfiguration of difference-based racial hierarchy requires alteration of the signifying function of lynching defenses. Alteration may be accomplished through either nonreflexive or reflexive approaches to the law of criminal lawyering. n93 A nonreflexive, or discretionary, approach draws upon traditions of lawyer independence to disavow racialized strategies. This unilateral approach conceives of the criminal defense lawyer as an unbridled moral activist. A reflexive or collaborative approach appeals to civic republican traditions to encourage lawyer-client deliberations of racial identity, moral character, and dialogic community. This bilateral approach restores the Brandeisian vision of "socially responsible advocacy." n94

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n93. Jack Balkin suggests two approaches to ideological demystification: nonreflexive and reflexive. See J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 Yale L.J. 1935 (1995) (reviewing Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993)). According to Balkin, a nonreflexive approach "sees ordinary citizens as suffering from a pathology, a defect that needs to be cured through the analyst's expertise." Id. at 1984. A reflexive approach, by comparison, "understands the relationship between the analyst and analysand as a disagreement about what is good, a disagreement that may be due to misunderstandings and ideological blinders on both sides." Id. at 1984-85.

n94. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 Yale L.J. 1445, 1471 (1996).

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Both discretionary and collaborative approaches to criminal lawyering reaffirm the bonds that link the criminal law to moral character n95 and community. To prevail, however, reaffirmation must confront the ascending rhetoric of excuse in criminal defense [\*1076] advocacy. n96 Interweaving gender, n97 race, n98 and the social environment, n99 the concept of excuse limits individual blame and collective accountability. n100 At the same time, it implicates the meaning of shame and shaming. n101

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n95. See Peter Arenella, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, Soc. Phil. & Poly., Spring 1990, at 59; Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 Ind. L.J. 719 (1992).

n96. See R. Jay Wallace, *Responsibility and the Moral Sentiments* 118-53 (1994); Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 Cornell J.L. & Pub. Poly. 1 (1995); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 Rutgers L.J. 671 (1988); Michael S. Moore, *Causation and the Excuses*, 73 Cal. L. Rev. 1091 (1985).

n97. See Anne M. Coughlin, *Excusing Women*, 82 Cal. L. Rev. 3 (1994); Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. Crim. L. & Criminology 80 (1994).

n98. See George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (1988).

n99. See K.D. Harries, *Crime and the Environment* (1980); Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 Law & Ineq. J. 9 (1985).

n100. See Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. Rev. 1511 (1992).

n101. See John Braithwaite, *Crime, Shame and Reintegration* (1989); Gabriele Taylor, *Pride, Shame, and Guilt: Emotions of Self-Assessment* 53-84 (1985); John Braithwaite, *Shame and Modernity*, 33 Brit. J. Criminology 1 (1993); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 630-52 (1996).

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Dan Kahan defines shame in terms of disgrace. Shame, according to Kahan, is "the emotion that a person experiences when she believes that she has been disgraced in the eyes of persons whom she respects." n102 As such, it illuminates the conjunction of culture, community, and the criminal justice system. n103

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n102. Kahan, *supra* note 101, at 636 (footnote omitted).

n103. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880 (1991).

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Lynching defenses encourage cultural and community resistance to shame n104 by inviting collective defiance of legal and nonlegal sanctions. n105 The defenses urge the renunciation of shame in favor of sympathy for white lawbreakers. n106 Instead of commonality with [\*1077] people or communities of color, the defenses incite separation and detachment.

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n104. See Martha Craven Nussbaum, *Shame, Separateness, and Political Unity: Aristotle's Criticism of Plato*, in *Essays on Aristotle's Ethics* 395, 427 (Amelie Oksenberg Rorty ed., 1980) (finding merit in the centrality of "character-friendship" within the Aristotelian polis, especially in its "capacity for refining self-criticism through emulation and the sense of shame" (footnote omitted)).

n105. See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chi. L. Rev. 133 (1996).

n106. Segregated pronouncements of racial sympathy mark the loss of Gordon Wood's notion of a "modern humanitarian sensibility." For Wood, that loss implies the abandonment of the Jeffersonian belief in the equality of the moral worth and authority of every individual. Abandonment of this ideal, he cautions, poses a threat to civil society. See Gordon S. Wood, *Thomas Jefferson, Equality, and the Creation of a Civil Society*, 64 *Fordham L. Rev.* 2133, 2141-42 (1996); see also Gordon S. Wood, *The Radicalism of the American Revolution* (1991).

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#### A. Jury Nullification

The racialized defense of jury nullification binds communities to racial difference and subordination. Construed as an expression of community moral sentiment, nullification seeks to rectify perceived inequalities of racial status. n107 Out of deference to the subordinate racial status of black jurors and defendants, Paul Butler explains that nullification occurs when a jury harbors objections to a law either on its face or as applied to a particular defendant and, accordingly, "disregards evidence presented at trial and acquits an otherwise guilty defendant." n108 Borrowing Butler's formulation for the purpose of upending it, the theory of jury nullification propounded here licenses white jurors to "approach their work cognizant of its political nature and their prerogative to exercise their power in the best interests" of the white community. n109

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n107. On racial bias in criminal trials, including the determination of guilt, see Shari Lynn Johnson, *Black Innocence and the White Jury*, 83 *Mich. L. Rev.* 1611 (1985).

n108. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677, 700 (1995). Butler adds:

Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge's instructions regarding the law. Instead, the jury votes its conscience.

Id.

n109. Id. at 715.

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Nullification defense strategies recognize race as a rhetorical presence in criminal jury selection and deliberation. n110 Recent literature on the criminal jury n111 confirms the magnitude of this presence. Race taints jury selection n112 notwithstanding the diverse demographic factors impinging on the process

of voir dire. n113 Similarly, race contaminates jury deliberation in spite of the constitu- [\*1078] tional aspiration of political insulation and cross-sectional community representation. n114

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n110. Cf. Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. Legal Educ. 566, 577 (1994).

n111. See Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 99-141, 207-39 (1994); Norman J. Finkel, *Commonsense Justice: Jurors' Notions of the Law* 172-95 (1995).

n112. See Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, in *Reading Racism and the Criminal Justice System* 87-100 (David Baker ed., 1994); Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 Natl. Black L.J. 238 (1994).

n113. See Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 Am. J. Trial Advoc. 285 (1995).

n114. See Lewis H. LaRue, *A Jury of One's Peers*, 33 Wash. & Lee L. Rev. 841 (1976); Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. Marshall L. Rev. 1 (1994); see also Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles*, 33 Am. Crim. L. Rev. 229 (1996).

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For the white defender of black lynching, the criminal jury trial provides a forum for citizen political participation aimed at curing the problem of white political, social, and economic disenfranchisement. n115 Deployed as an "audience-based theory of argument," n116 nullification rhetoric imbues the racialized speech found in opening and closing statements, direct and cross examinations, and even objections. The rhetoric vocalizes the political astonishment n117 of the white community toward lynching prosecutions. For defenders of that community, the ethical task is to "distinguish between what can be said and what cannot be said" n118 in the service of racial supremacy.

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n115. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203 (1995).

n116. Saunders, *supra* note 110, at 577.

n117. Cf. Louis E. Wolcher, *The Man in a Room: Remarks on Derrida's Force of Law*, 7 Law & Critique 35, 40 (1996).

n118. *Id.* at 63.

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The evidence of community astonishment apparent in jury nullification points to an entrenched sociolegal consciousness of racial hierarchy. Demonstrated in public through the media n119 and in private through talk of conspiracy or hoax, n120 hierarchy-instilled racial consciousness molds the sociolegal reality of the criminal law. The rhetorical stratagems of prosecution and defense teams reflect that reality. n121 The constitution of the racialized self and racial community mirrors the same reality. n122 Forged from the hierarchical tension of racial status domination and subordination, both the self and community suffer from the deformities of negation.

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n119. See Susan F. Hirsch, *Interpreting Media Representation of a "Night of Madness": Law and Culture in the Construction of Rape Identities*, 19 *Law & Soc. Inquiry* 1023 (1994).

n120. See Katheryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 *Ind. L.J.* 593 (1996); see also Regina Austin, *Beyond Black Demons & White Devils: Antiracist Conspiracy Theorizing & The Black Public Sphere*, 22 *Fla. St. U. L. Rev.* 1021 (1995).

n121. See Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 *Am. Crim. L. Rev.* 1, 36 (1995).

Pilcher remarks that:

Criminal prosecution serves a broadly educational function as well as an individually punitive one: public views of blameworthiness are significantly influenced by what is prosecuted, just as what is criminalized is influenced by public disapproval. Provided the enforced norm is perceived as morally legitimate, and the violator thus blameworthy, the norm is internalized and accrues power as a socializing force. Criminal enforcement in the absence of socialization of the norm, however, can have the opposite effect; if the public would not collectively react to violation of the norm with condemnation then the particular prohibition has no distinctive social power. This, in turn, fosters the diminished respect for the law ....

*Id.*

n122. See Margaret Jane Radin, *The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood*, 74 *Or. L. Rev.* 423, 430 (1995). ("For appropriate self-constitution, both strong attachment to context and strong possibilities for detachment from context are needed. Because these requirements seem to oppose each other, they exist in tension. This tension causes problems for theory and contradictory tendencies in practice.").

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B. Victim Denigration

The racialized defense of victim denigration rests on the negation of racial identity in law and culture. n123 Negation fragments racial identity n124 and scatters deformed images throughout the criminal process. n125 Criminal defense lawyers employ this imagery in the "elaboration of difference." n126 Racial difference establishes the predicate for the segregation of the white self and the black other. Lynching defenders seek to enforce racial segregation by affirming the status of the white lawbreaker and demeaning the body of the black victim. n127

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n123. See Jan Nederveen Pieterse, *White on Black: Images of Africa and Blacks in Western Popular Culture* 51-63, 132-41, 152-56, 174-78 (1992); see also Adele Logan Alexander, "She's No Lady, She's a Nigger": Abuses, Stereotypes, and Realities from the Middle Passage to Capitol (and Anita) Hill, in *Race, Gender and Power in America: The Legacy of the Hill-Thomas Hearings* 3 (Anita Faye Hill & Emma Coleman Jordan eds., 1995); A. Leon Higginbotham, Jr., *The Hill-Thomas Hearings - What Took Place and What Happened: White Male Domination, Black Male Domination, and the Denigration of Black Women*, in *Race, Gender and Power in America: The Legacy of the Hill-Thomas Hearings*, supra, at 26.

n124. See Regina Austin, "A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America, 1994 *Utah L. Rev.* 147; Erika L. Johnson, "A Menace To Society:" The Use of Criminal Profiles and Its Effects on Black Males, 38 *Howard L.J.* 629 (1995).

n125. See Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, 1992 *U. Ill. L. Rev.* 997; Ariela Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 *Yale J.L. & Human.* 267 (1995); Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 *Brook. L. Rev.* 1165 (1995); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 *Tul. L. Rev.* 1739 (1993); Lawrence Vogelmann, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 *Fordham Urb. L.J.* 571 (1993).

n126. See Chanock, supra note 59, at 935 (discussing the "elaboration of difference" through law).

n127. Modern criminal law jurisprudence discloses a growing interest in the position of the victim. See, e.g., George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (1995); Lynne Henderson, *Whose Justice? Which Victims?*, 94 *Mich. L. Rev.* 1596 (1996) (reviewing Fletcher, supra).

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[\*1080]

The denigration defense centers on the racially subordinate status of black victims. n128 Affirming this unequal status renews long standing claims of moral, physical, mental, and genetic inferiority. The claims provide the historical rationale not only for lynching, but also for eugenic segregation and sexual sterilization. n129 They also supply the basis for assigning qualities of bad or immoral character to black victims.

## -----Footnotes-----

n128. See Stephen L. Carter, *When Victims Happen to be Black*, 97 Yale L.J. 420 (1988); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. Miami L. Rev. 127 (1987).

n129. See Edward J. Larson, *Sex, Race, and Science: Eugenics in the Deep South* (1995); Edward J. Larson, "In the Finest, Most Womanly Way:" Women in the Southern Eugenics Movement, 39 Am. J. Legal Hist. 119 (1995).

## -----End Footnotes-----

To lynching defenders, black victims possess immoral character. Infirmitities of character render such victims undeserving of privacy or dignity. The deterioration of victim-specific privacy interests attends the steady collapse of the boundary line separating public from private realms in law and liberal theory. Calling upon the state for juridical vindication hastens that collapse. n130 State action, in a significant sense, propels the victim of private violence into a public role.

## -----Footnotes-----

n130. See Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 Denv. U. L. Rev. 931, 941 (1995) ("The sphere of privacy protected by liberal rights largely evaporates once the individual invites in state assistance.").

## -----End Footnotes-----

Acting in concert with the state, criminal defense lawyers frame the identity of victims in the public sphere of the courtroom. n131 Framing in advocacy causes revictimization in death. Like victim impact statements, victim denigration statements "permit, and indeed encourage, invidious distinctions about the personal worth of victims." n132 Such distinctions, Susan Bandes comments, contradict the principle of moral equality in the criminal law. n133

## -----Footnotes-----

n131. See generally Mary I. Coombs, *Telling the Victim's Story*, 2 Tex. J. Women & L. 277 (1993); Patricia Y. Martin & R. Marlene Powell, *Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims*, 19 Law & Soc. Inquiry 853 (1994).

n132. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361, 406 (1996).

n133. See *id.*

## -----End Footnotes-----

Increasingly embroiled in Supreme Court jurisprudence, n134 victim-related statements demonstrate the force of moral passion and emotion embedded in racialized defenses. n135 The racially impassioned rhetoric of victim denigration demands judgments of nar- [\*1081] rative inclusion and exclusion. Bandes describes narrative judgment as "unavoidably normative" and

"value-laden." n136 In her view, the issue "is always which narratives we should privilege and which we should marginalize or even silence." n137

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n134. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991), overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989).

n135. See Markus D. Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 Buff. L. Rev. 85 (1993); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 Sup. Ct. Rev. 77.

n136. Bandes adds:

Once we acknowledge the instrumental, political nature of legal narrative, we can enter the difficult discussions of why marginalization of some narratives occurs, how to separate the wrongly excluded narratives from those that ought to be excluded, how to include the wrongly marginalized narratives in legal discourse, and how to ensure that they are actually heard.

Bandes, *supra* note 132, at 387-88 (footnotes omitted).

n137. *Id.* at 409. Death penalty abolitionists, for example, urge the silencing of victim impact narratives on the ground that they "incline the sentencer in favor of death, thus impugning the reliability of the jury's decision as an objective benchmark of the evolving standards [of decency]." Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 Hastings Const. L.Q. 455, 520 (1996). The resultant death sentences, accordingly, "are invalid gauges of societal standards of decency and should be given little probative force in the constitutionality determination." *Id.* at 521.

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Victim denigration statements privilege narratives of white innocence and resistance antagonistic to black identity and the corollary value of black self-esteem. n138 The narratives reproduce racial hierarchies of moral worth, emphasizing the role of black depravity even at death. Denigration rhetoric of this kind ventures to establish an "empathetic link" n139 between white lawbreakers and white jurors, thereby coloring the judgment of culpability. n140 In the same way, the diminished capacity rhetoric of racial delusion seeks out the empathetic ratification of segregated community.

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n138. For a discussion of self-esteem and related values, see Roy L. Brooks, *Analyzing Black Self-Esteem in the Post-Brown Era*, 4 Temple Pol. & Civ. Rts. L. Rev. 215, 217 (1995). Brooks defines self-esteem in terms of two components. The first, called specific or personal self-esteem, "measures an individual's belief in his or her own virtue and moral self-worth." *Id.* The second, called

personal efficacy, "reflects a sense of personal competence, efficacy, or control." *Id.*

n139. Bandes explains:

More often, the difficulty for the trier of fact is in making the empathetic link with the defendant, in seeing the defendant's shared humanity. In either situation, though, the real importance of empathy lies in its counternarrative aspect - it enables the trier of fact to imagine himself in the place of another.

Bandes, *supra* note 132, at 377.

n140. Cf. Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 Soc. Probs. 389 (1985); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 Wm. & Mary L. Rev. 1201 (1992).

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### C. Diminished Capacity

The racialized defense of diminished capacity combines commitment, community, and delusion to free white lawbreakers of moral and criminal culpability. Freedom follows from the commitment to segregated community. Heralded in the case of lynching, that com- [\*1082] mitment triggers the diminished capacity defense. Proponents of the defense contend that the extreme nature of white commitment to community-wide racial supremacy induces a state of mind bordering on delusion. Thus misguided, white lawbreakers perform acts of racial violence without individual or collective remorse.

Like jury nullification and victim denigration, the defense of diminished capacity illustrates the pivotal role of counsel in perpetuating racial violence. The defense directs counsel to put the white lawbreaker's state of mind in legal controversy. It is counsel's duty to assert client claims of diminished capacity and incompetency, whether attributable to emotional disturbance or to insanity. n141 The claim of racial delusion satisfies that duty. n142

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n141. See, e.g., Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 Wis. L. Rev. 65.

n142. See Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. Rev. 113 (1996).

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Excusing white lawbreakers from liability on the ground of delusion-inducing racial emotion dilutes the moral force of criminal defense advocacy. Emotion is fundamental to this dilution. n143 The diminished capacity defense depicts white lawbreakers caught up in the emotion of populist resistance. n144 Discarding the image of white savagery, the defense offers the alternative impression of white innocence, an innocence filled with a commitment to community solidarity. Comparable to duress, n145 this commitment to solidarity brings to bear elements of psychological and physical coercion upon individuals enmeshed in the culture of white supremacy, n146 recasting violence as "prejudiced irrationality." n147

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n143. On the role of emotion in criminal law, see Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269 (1996).

n144. For an example of the populist justification for lynching, see the description in Nancy MacLean, The Leo Frank Case Reconsidered: Gender and Sexual Politics in the Making of Reactionary Populism, 78 J. Am. Hist. 917, 920, 943-44 (1991).

n145. See generally Joshua Dressler, Understanding Criminal Law 259-73 (1987); Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, 62 S. Cal. L. Rev. 1331 (1989).

n146. Cf. David S. Rutkowski, A Coercion Defense for the Street Gang Criminal: Plugging the Moral Gap in Existing Law, 10 Notre Dame J.L. Ethics & Pub. Poly. 137 (1996).

n147. The phrase originates with Kathryn Abrams. See Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2524 (1994).

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The image of the community-minded white innocent evokes race and the racial body. Tami Spry speaks of "the body that is visible as a cultural symbol." n148 The diminished capacity defense [\*1083] puts forward the black body as a cultural object. According to this defense, the killing of the black body, indeed the act of lynching itself, constitutes an act of empowerment, an act of human agency vital to the identity construction of the white self and the white community. The defense prevails despite its intimation of social pathology. n149

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n148. Tami Spry, In the Absence of Word and Body: Hegemonic Implications of "Victim" and "Survivor" in Women's Narratives of Sexual Violence, 18 Women & Language 27, 29 (1995) (emphasis omitted).

n149. Kathryn Abrams cites a similar tension experienced by women's defense lawyers attempting to navigate "between the need to defend battered women who kill (often through the use of defenses such as 'learned helplessness') and the need for battered women, and women as a group, to project an image reflecting some capacity for agency." Kathryn Abrams, Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality, 57 U. Pitt. L. Rev. 337, 362 n.104 (1996).

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The modern jurisprudence of the criminal law supports the claim of racial violence as pathology. n150 In its current rendition, the claim suggests that the presence of racially coercive n151 pathology negates the free will n152 and responsibility n153 of the white lawbreaker. n154 This reading, however, flips the standard legal dichotomy of agent-victim or perpetrator-victim on its head. n155 Kathryn Abrams explains that "the categories of perpetrator and victim are understood to be simple and unitary: the perpetrator enjoys full agency, and the victim either lacks as a categorical matter, or loses through the experience of discrimination, virtually all capacity for self-direction." n156 Yet, under the racial delusion defense of agent-as-victim, it is the white perpetrator who lacks the cognitive capacity for independent moral direction and the black victim who invites racial retribution. Discordantly, in a manner akin to disability and incompetence, this cognitive impairment actually warrants greater lawyer solicitousness n157 precisely because it renders moral conscience and punishment irrelevant. n158

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n150. On pathology and criminal law, see Stephen J. Morse, *Brain and Blame*, 84 Geo. L.J. 527 (1996).

n151. On coercion, see Alan Wertheimer, *Coercion* 144-75 (1987).

n152. For a discussion of the metaphysics of volition, see Michael S. Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* 113-65 (1993).

n153. See generally Wallace, *supra* note 96, at 51-83; Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. Pa. L. Rev. 2245 (1992).

n154. Cf. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1882-85 (1996).

n155. See Abrams, *supra* note 149, at 348.

n156. *Id.* at 348; see also Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 Colum. L. Rev. 304, 324-29 (1995).

n157. See Jeff McMahan, *Cognitive Disability, Misfortune, and Justice*, 25 Phil. & Pub. Aff. 3, 35 (1996) (claiming "indirect or derivative moral reasons to be specially solicitous about the well-being of the cognitively impaired").

n158. See Stephen J. Morse, *Culpability and Control*, 142 U. Pa. L. Rev. 1587, 1634-37 (1994).

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[\*1084]

Deriving a lynching defense from the social-psychology of racial delusion privatizes the social issue of racism. Privatization ignores the social undercurrents of hate crime in America. n159 The move from the public to the

private sphere, and the corresponding shift from moral evil to scientific pathology, allows the legal profession to evade responsibility for its complicity in maintaining racial violence.

-Footnotes-

n159. See generally Jack Levin & Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed* (1993); Lu-in Wang, *Hate Crimes Law* (1996); James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. Crim. L. & Criminology 366 (1996); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 Mich. L. Rev. 320 (1994).

-End Footnotes-

### III. Lynching Ethics

Lynching ethics describes the normative system that criminal lawyers employ to justify the racialized defenses of jury nullification, victim denigration, and diminished capacity. Reassembled here from modern and postmodern conceptions of criminal defense representation, that value system sacrifices collective moral deliberation as a regulative ideal n160 to the zealous advancement of individual freedom. n161 Indeed, the systematic objective of criminal defense advocacy is to preserve individual client freedom. Conventionally, freedom comprises both positive and negative rights. Yet, for the criminal defendant, negative rights acquire principal emphasis in erecting a bulwark against state encroachment upon political and civil liberties.

-Footnotes-

n160. On Kantian moral deliberation, see Paul Guyer, *The Value of Agency*, 106 Ethics 404, 405-20 (1996) (book review).

n161. For a discussion of liberty as either a collective social reaction or an elite ideology, see Warren Sandmann, *The Argumentative Creation of Individual Liberty*, 23 Hastings Const. L.Q. 637, 638 (1996).

-End Footnotes-

To ensure the preservation of ordered liberties, defense attorneys seek to establish more stringent standards of state conduct in criminal cases. n162 To that end, they espouse the principles of liberal legalism and the rhetoric of rights. n163 The presumption of inno- [\*1085] cence, the right to remain silent, and the burden of state proof beyond a reasonable doubt n164 all testify to the strength of liberalism in asserting private rights against the state and its penal incursions.

-Footnotes-

n162. Barton Ingraham explains:

The most common rationalization given for the higher and stricter standards and rules in criminal cases is the greater severity of its sanctions (punishments) as well as its social consequences (stigma, disrepute). Another common rationalization is the greater need in criminal cases for protection of the individual against the massive forces and resources of the state.

Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. Crim. L. & Criminology 559, 574 (1996).

n163. French explains: "Rights talk, which points toward rules and principles and currently has great moral weight, is based on a story about the relationship between the state and its component individuals just as individual narratives are." French, *supra* note 86, at 426.

n164. See generally Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1301 (1977).

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Grasping the injunction of zealous criminal defense advocacy requires engagement with liberal theory, particularly its vision of state power, corruption, and malice. Consistent with the tradition of liberal political theory, David Luban attributes state power, and its abuse, to advantages in police and prosecutorial resources, criminal procedure, political legitimacy, and bargaining position. n165 Based on this balance of state advantages, Luban recommends the professional norm of zealous advocacy to criminal defense lawyers. n166 Nonetheless, suspicious of presumptive absolutes, he warns that this role-derived norm is rebuttable. n167

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n165. See David Luban, *Are Criminal Defenders Different?*, 91 Mich. L. Rev. 1729, 1730-52 (1993).

n166. See *id.* at 1755-57.

n167. See *id.* at 1757-58; see also David Luban, *Lawyers and Justice: An Ethical Study* 129-33 (1988).

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Luban's broadly framed version of the zealous advocacy defense contrasts sharply with William Simon's narrowly tailored formulation. n168 Simon rejects the categorical use of zealous advocacy in the criminal sphere, endorsing only the selective use of aggressive defense tactics when warranted by substantive justice objections to unjustly harsh or discriminatory punishment, especially if traceable to political disenfranchisement. n169 That categorical rejection evinces a fundamental disagreement over the meaning and requirement of deception in criminal defense advocacy. For Luban, criminal defense advocacy necessitates deceptive defense tactics. n170 For Simon, deception imperils the moral self-conception of defense lawyers and, consequently, risks alienation and loss of moral integration. n171

## -Footnotes-

n168. See William H. Simon, *The Ethics of Criminal Defense*, 91 Mich. L. Rev. 1703, 1703 (1993).

n169. See *id.* at 1724-25.

n170. See Luban, *supra* note 165, at 1760-61.

n171. See William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 Mich. L. Rev. 1767, 1772 (1993).

## -End Footnotes-

Deception is central to the ideology and practice of racialized defenses. Although generally absent from accounts of the motivations of criminal defense lawyers, n172 deception permeates the advocacy function, distorting client identity and condemning the search for truth, even the contingent truth realized in particularized contexts. n173 Both modern and postmodern accounts of criminal defense practice renounce the search for truth. Uninterested in the moral commitments accompanying fragmentary moments of historical truth, the accounts find relevance only in the machinery of adversarial justice.

## -Footnotes-

n172. See, e.g., Roy B. Flemming, *If You Pay the Piper, Do You Call the Tune? Public Defenders in America's Criminal Courts*, 14 L. & Soc. Inquiry 393 (1989) (book review); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 Harv. L. Rev. 1239 (1993); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. Rev. L. & Soc. Change 433 (1994).

n173. See Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 Stan. L. Rev. 39, 39-43 (1994).

## -End Footnotes-

## A. The Modernist Justification.

The modernist justification of racialized defenses hinges on lawyer commitment to the institutional values of the adversarial system. Performing within this system, criminal defense lawyers internalize adversarial norms, meanings, and roles. n174 Norm-internalization, Allan Gibbard explains, "involves tendencies toward action and emotion, tendencies that are coordinated with the tendencies of others in ways that constitute matched adaptations, or are the results of matched adaptations." n175

## -Footnotes-

n174. See Allan Gibbard, *Wise Choices, Apt Feelings: A Theory of Normative Judgment* 55-82 (1990) (distinguishing between "accepting a norm" and "being in

the grip of a norm"); see also Arthur Isak Applbaum, Professional Detachment: The Executioner of Paris, 109 Harv. L. Rev. 458, 473-86 (1995); David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times, 9 Geo. J. Legal Ethics 31, 86 (1995) (urging restoration of parity between the two modes of norm-adoption: internalization and acceptance); Cass R. Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903, 947 (1996) (asserting that "people usually do not choose norms, meanings, and roles; all of these are (within limits) imposed").

n175. Gibbard, *supra* note 174, at 71.

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Consider the norm of role-differentiated morality. n176 Applied to the matched prosecution-defense adaptations of the adversarial system, role-based differentiation severs professional morality from personal and community morality, enabling the criminal defense lawyer to serve in the guise of Monroe Freedman's "champion against a hostile world." n177 Rooted in the Sixth Amendment notion [\*1087] of adversarial fairness, n178 the norm of role-differentiated morality commands "fair process" and, by extension, effective counsel. n179

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n176. See Alan H. Goldman, The Moral Foundations of Professional Ethics 20-33, 155 (1980); David Luban, Introduction to The Ethics of Lawyers, at xi, xii-xiv (David Luban ed., 1994); Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1 (1975).

n177. Monroe E. Freedman, Legal Ethics and the Suffering Client, 36 Cath. U. L. Rev. 331, 332 (1987).

n178. See, e.g., Stephen Landsman, The Adversary System (1984); Gary Goodpaster, On the Theory of American Adversary Criminal Trial, 78 J. Crim. L. & Criminology 118 (1987).

n179. See Stephen B. Bright, The Electric Chair and the Chain Gang: Choices and Challenges for America's Future, 71 Notre Dame L. Rev. 845, 851 (1996); Gerald F. Uelman, 2001: A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel, 58 Law & Contemp. Probs. Winter 1995, at 13.

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The modernist account of lynching ethics defines the role-derived norm of effective representation in terms of the traditional axioms of neutral partisanship n180 and moral nonaccountability. n181 Partisanship, Rob Atkinson explains, "entails advancing client ends through all legal means, and with a maximum of personal determination, as long as the ends are within the letter of the law." n182 Neutrality, Atkinson adds, "lets the professional claim personal disinterest in, or even antipathy toward, client ends and moral nonaccountability for helping to advance them." n183

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n180. See Model Rules of Professional Conduct Rule 1.3 cmt. 1 (1989) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); see also James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 Cap. U. L. Rev. 735 (1992).

n181. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669, 673-74 (1978).

n182. Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 Yale L.J. 177, 185 (1995).

n183. *Id.*

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The complementary norms of neutral partisanship and moral nonaccountability envisage criminal law practice as a technical, apolitical craft. n184 The practice of racialized defenses clearly entails technical expertise. But neither the accumulation nor the application of that expertise precludes politics, in this case the identity-making and community-defining politics of race.

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n184. See *id.* at 186; Charles P. Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3 (1951).

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The rhetorical politics of racialized defenses proclaims the Model Code and the Model Rules colorblind to matters of identity and community. Declarations of neutrality and neutral principles, n185 however, obscure racial hierarchy. The doctrinal pretense of impartially tracking evidence of discriminatory intent n186 supplies no resolution to the establishment of racial privilege. And yet, this is [\*1088] the answer contained in race-neutral proclamations emanating from the politics of racial "nonrecognition." n187

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n185. See Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982 (1978); Cass R. Sunstein, *Neutrality in Constitutional Law* (with Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1 (1992); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

n186. See Barbara J. Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953 (1993).

n187. See Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. Pitt. L. Rev. 363, 366 (1996) ("Color blindness permits racial subordination to continue by leaving intact institutions created by centuries of official and private oppression."); see also Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*,

45 Stan. L. Rev. 1133 (1993); Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 Cal. L. Rev. 935 (1994); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 Stan. L. Rev. 1 (1991).

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This same rhetorical politics pronounces jury nullification, victim denigration, and diminished capacity as expressions of private preferences outside the public reach of juridical sanction. Construing racialized defenses as private litigant preferences revitalizes the public-private distinction in law and lawyering. n188 The reinstantiation of that dichotomy encases criminal defense advocacy in the liberal rhetoric of privacy n189 and autonomy. n190 Privacy talk shields racialized advocacy from ethical regulation, effectively granting attorneys and their clients immunity from public scrutiny.

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n188. See Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 Stan. L. Rev. 1 (1992); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 Const. Commentary 319 (1993); Symposium, *The Public-Private Distinction*, 130 U. Pa. L. Rev. 1289 (1982).

n189. Cf. Linda C. McClain, *The Poverty of Privacy?*, 3 Colum. J. Gender & L. 119 (1992); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and The Right of Privacy*, 104 Harv. L. Rev. 1419 (1991); Elizabeth M. Schneider, *The Violence of Privacy*, 23 Conn. L. Rev. 973 (1991).

n190. See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 Yale. J.L. & Feminism 7 (1989); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988).

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No concession of immunity should go unqualified. To the extent that racialized defenses blend private choice and state enforcement, they come within the meaning of state action. n191 In this way, the defenses expose lawyers and clients to potential liability under anti-discrimination laws as well as relevant disciplinary codes. The treatment of nullification, denigration, and diminished capacity verdicts as the reasoned, deliberative products of a democratic community fails to insulate lawyers against such liability. Rather, that treatment obliterates the civic republican ideal of public reason. n192 The rhetorical politics of race in fact undermines the principles of public, reasoned dialogue that stand at the core of civic republicanism. n193

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n191. In 1991, the Supreme Court announced that a private party's discriminatory conduct at trial constitutes state action under the Equal Protection Clause of the Fourteenth Amendment. See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

n192. See Suzanna Sherry, *The Sleep of Reason*, 84 Geo. L.J. 453, 469 (1996).

n193. See Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 Cal. L.

Rev. 329 (1994); Lawrence B. Solum, Constructing an Ideal of Public Reason, 30 San Diego L. Rev. 729 (1993).

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[\*1089]

## B. The Postmodernist Justification

The postmodernist justification of racialized defenses discards claims of neutrality and stability in law for the contested politics of ideology. n194 Under the postmodern account of lynching ethics, effective representation heeds what Kenneth Anderson calls the "instrumentalist, transactional, mobile ethos of the contemporary professional." n195 That ethos, Anderson remarks, devolves into a devotion to "purely instrumental technique, without a conception of or commitment to the social 'ends' of professional knowledge, except as they are temporarily defined by the market for expert services." n196 Indeed, for the postmodernist, professional devotion imposes a duty to muster the "best arguments" on behalf of a client n197 - arguments that, according to Sanford Levinson, amount to the "crassest, most instrumental" defense possible. n198

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n194. See Eliot Freidson, Professionalism as Model and Ideology, in *Lawyers' Ideals/Lawyers' Practices* 215-29 (Robert L. Nelson et al. eds., 1992); Robert L. Nelson & David M. Trubek, Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in *Lawyers' Ideals/Lawyers' Practices*, supra, at 177-214; William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29.

n195. Kenneth Anderson, A New Class of Lawyers: The Therapeutic as Rights Talk, 96 Colum. L. Rev. 1062, 1073 (1996) (review essay).

n196. Id. at 1063.

n197. See Sanford Levinson, The Limited Relevance of Originalism in the Actual Performance of Legal Roles, 19 Harv. J. L. & Pub. Poly. 495, 506 (1996).

n198. See id.

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Under the racialized defenses of jury nullification, victim denigration, and diminished capacity, the "best argument" gains credence through white community acceptance. Rendering the moral quality of legal argument contingent on local community approbation trivializes larger ethical and normative considerations. n199 Lawyering affords no escape from the political and community commitments of normative judgment. Even when the reduction of professional service to "technical assistance" tends "to reduce moral concerns to matters of individual taste, if not idiosyncrasy," n200 it leaves the politics of normativity n201 in advocacy to collective discernment.

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n199. See Eric Blumenson, Mapping the Limits of Skepticism in Law and Morals, 74 Texas L. Rev. 523, 527-28 (1996).

n200. Atkinson, *supra* note 182, at 186.

n201. See Symposium, The Critique of Normativity, 139 U. Pa. L. Rev. 801 (1991).

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Conceived in personal or collective terms, the postmodern politics of normativity problematizes the most basic moral aspiration. n202 [\*1090] Implicitly, moral aspiration carries a claim of objective truth. n203 Parsing that claim, Eric Blumenson notes that however disparaging of value neutrality, a morality-centered aspirational ethics must still "presuppose that objectively correct answers exist and that there is an impartial position from which to distinguish legitimate from illegitimate uses of power." n204

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n202. See Blumenson, *supra* note 199, at 531.

n203. See Ronald Dworkin, Objectivity and Truth: You'd Better Believe It, 25 Phil. & Pub. Aff. 87, 89 (1996).

n204. Blumenson, *supra* note 199, at 529. The presupposition of objectivity and impartiality also afflicts the experiential decisionmaking of pragmatism. See James R. Hackney, Jr., The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism, 39 Am. J. Legal Hist. 443, 452 (1995) (noting that pragmatists' "appeal to experience was not a value neutral appeal: the implications of the experience appealed to by individual pragmatists was shaped by their own value orientation").

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Levinson condemns the objective posture of an aspirational ethics as incapacitating. n205 For Levinson, the dismissal of a properly instrumental legal argument for reasons of illegitimacy, or the conditioning of retainer and representation on the presentation of a single argument, amounts to incompetence, even if the argument disposed of makes the lawyer "retch." n206 This instrumental position suggests not only the acceptance of adversarial norms, n207 but also the tolerance of formal neutrality exemplified in the treatment of race in the courtroom. It also repudiates Michael Tigar's vision of the false, and apparently rigged, elements of the criminal trial. n208

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n205. See Levinson, *supra* note 197, at 507.

n206. *Id.*

n207. See Gibbard, *supra* note 174, at 75; Luban & Millemann, *supra* note 174, at 86-87.

Gibbard observes:

Accepting a norm is something that we do primarily in the context of normative discussion, actual and imaginary. We take positions, and thereby expose ourselves to demands for consistency. Normative discussion of a situation influences action and emotion in like situations. It is then that we can speak of norms as governing action and emotion, and it is through this governance that normative discussion serves to coordinate. Internalizing a norm is likewise a matter of coordinating propensities, but the propensities are of a different kind: they work independently of normative discussion.

Gibbard, *supra* note 174, at 75.

n208. See Michael E. Tigar, *Defending*, 74 Texas L. Rev. 101, 109 (1995).  
Tigar notes:

In the courtroom arena, there is a symbolic equality of defense and prosecution. We understand that in fact the balance of resources almost always tips in favor of the government, and this is particularly so in high-profile cases where high officials have announced an intention to take the defendants' lives. The defendant is not given a choice whether to participate in the unequal contest. The inequality is just another device of the system-called-justice. The lawyer's job is to expose the device, deploying the signs of justice against the signs of system-called-justice. The signs of justice include empowering the jury, calling on the tribunal to respect its oath, exposing contradiction - bringing out solid reasons why the judge and jurors should go beneath the surface of things.

Id. at 109-10.

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The clustering of formal, adversarial norms around the purportedly neutral, objective practice of racialized defenses confirms Gunther Teubner's view that norms " 'constitute' fields of social ac- [\*1091] tion," and that such "fields of action in turn reconstitute legal norms." n209 For the postmodern defender of lynching, adversarial norms concededly legitimize the language of racial hierarchy and, hence, reproduce race relations of domination and subordination. By the same admission, relations of racial superiority and inferiority reentrench norms of inequality. To break down hierarchical race relations, the next Part proposes a reconstructed ethic of lynching defenses based on a commitment to a morality of character and community grounded in the norms of virtue, citizenship, race consciousness, and spirituality.

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n209. Gunther Teubner, *Regulatory Law: Chronicle of a Death Foretold*, 14 *Current Legal Theory* 3, 22 (1996).

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#### IV. Lynching Ethics Reconstructed

Both Simon and Luban draw on the notion of moral commitment in constructing the concepts of ethical discretion n210 and activist counseling. n211 Although laudable, these shared visions of moral action fail to resolve the controversial status of race, racialized strategy, and race-neutral representation in the law and ethics of criminal defense lawyering. Confronting the status, strategy, and substance of racial representation in lynching necessitates amplification of the ethic of race-conscious responsibility.

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n210. See William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1083-84 (1988).

n211. See David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 Am. B. Found. Res. J. 637, 640-41.

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The ethic of race-conscious responsibility demands a transformation of the liberal regime of colorblind criminal defense practice from the perspective of race. Race-ing the ethics of lynching defenses challenges the identity-making practices of criminal lawyers, especially the tendency to associate racial difference with deviance and inferiority and, thus, to reenact racial subordination in advocacy. That challenge requires the reintegration of law, morality, and legal ethics. Reintegration flows from the adoption of foundational norms and values.

The call for the restoration of values in the legal profession resonates in the current ethics literature. n212 The prevailing criminal defense ethics of lynching sustains a thin normative conception of professionalism deficient in virtue, citizenship, community, and spirituality. Mired within this conception, alternative notions of [\*1092] professionalism n213 and regulation n214 lapse into repose. The silence of that repose is attributable to the liberalism-based exclusion of public moral pronouncement n215 from the lawyer-client relationship. Liberalism offers a private, contractarian basis for the lawyer-client relationship that emphasizes the priority of technique, procedure, and perspectivelessness. n216

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n212. See, e.g., Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (1994); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).

n213. See Thomas L. Shaffer & Mary M. Shaffer, *American Lawyers and Their Communities: Ethics in the Legal Profession* 196-217 (1991); Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *Lawyers' Ideals/Lawyers' Practices*, supra note 194, at 230-57; Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will*

Improve the Conduct and Reputation of the Bar, 70 N.Y.U. L. Rev. 1229, 1256-63 (1995).

n214. See David B. Wilkins, Who Should Regulate Lawyers?, 105 Harv. L. Rev. 799 (1992).

n215. See Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 123-67 (1996) (discussing civic virtue and the public good in the early American republic).

n216. For a discussion of perspectivelessness, see Kimberle W. Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 Natl. Black L.J. 1,2 (1989).

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Envisioning the lawyer-client relationship as a private, contractual order permits the exploration of certain background regulatory norms, n217 such as reciprocity. n218 The norm of reciprocity treats the racialized defenses of jury nullification, victim denigration, and diminished capacity as the efficient, transactional product of lawyer-client value consensus. Rather than assail the defenses for inefficiency, n219 citing for example the external costs to character and community, the ethic of race-conscious responsibility attacks the premise of private, moral consensus as overbroad. On this view, reciprocity proves counterfactual and moral dialogue degenerates into an expedient maneuver. The normative embrace of virtue, citizenship, multi-racial community, and spirituality signals the redemptive search of moral activism.

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n217. Cf. Avery Katz, Taking Private Ordering Seriously, 144 U. Pa. L. Rev. 1745, 1749-53 (1996).

n218. See Richard H. Pildes, The Destruction of Social Capital Through Law, 144 U. Pa. L. Rev. 2055, 2063 (1996). Pildes contends that the norms of reciprocity contain a specific or local strand which "sustains ongoing relationships between specific parties . . . in direct, one-to-one interactions . . . [as well as a generalized strand which] is a more global predisposition to be motivated by norms of reciprocity and cooperation even when acting in new settings or with new agents outside some previously established relationship." Id. at 2064 (footnote omitted).

n219. See David Charny, Illusions of a Spontaneous Order: "Norms" in Contractual Relationships, 144 U. Pa. L. Rev. 1841, 1848-52 (1996) (claiming that inefficient norms "favor the members of concentrated interest groups, at the expense of more diffuse members").

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#### A. Virtue

The norm of virtue strengthens the moral content of the ethic of race-conscious responsibility through legal reasoning and practice. n220 Cultivating virtue through practical reasoning n221 dictates more [\*1093]

than the performance of lawyer role morality. n222 It requires seizing upon the expressive function of law.

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n220. See, e.g., Reed Elizabeth Loder, *When Silence Screams*, 29 Loy. L.A. L. Rev. 1785 (1996); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 Notre Dame Lawyer 231 (1979).

n221. See J. David Velleman, *The Possibility of Practical Reason*, 106 Ethics 694 (1996) (defining the object and justification of practical reasoning).

n222. See Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 Md. L. Rev. 853, 947-77 (1992).

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Many laws, Cass Sunstein comments, contain an expressive component. n223 According to Sunstein, such laws " 'make a statement' about how much, and how, a good or bad should be valued." n224 The statement materializes in the form of "social meanings, social norms, and social roles." n225 By design, this material valuation alters existing norms and shapes external behavior. n226 The logic of this expressive influence depends on a shared sense of appropriate normative direction.

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n223. See Sunstein, *supra* note 174, at 964.

n224. *Id.*

n225. *Id.*

n226. See *id.*

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Both the Model Code and the Model Rules combine expressive functions and justifications. The regulatory decrees of lawyer competence and candor illustrate these common tendencies. For example, the Model Rules mandate "competent representation" of a client, specifying the "legal knowledge, skill, thoroughness and preparation reasonably necessary" to satisfy the nature and circumstances of a disputed matter. n227 Justification for requisite levels of attention and preparation rests on the gravity of "what is at stake." n228 Additionally, the Model Rules require lawyer candor toward the tribunal and, to a lesser degree, the opposing party and counsel. n229 Justification of the duty of candor obtains from the obligation "to avoid implication in the commission of perjury or other falsification of evidence." n230 This obligation allegedly ensures fair competition in the adversarial procedure of marshalling contested evidence. n231

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n227. Model Rules of Professional Conduct Rule 1.1 (1995); see also Model Code of Professional Responsibility DR 6-101 (1980).

n228. Model Rules of Professional Conduct Rule 1.1 cmt. (1995).

n229. See Model Rules of Professional Conduct at Rules 3.3, 3.4 (1995).

n230. Model Rules of Professional Conduct Rule 3.3 cmt. (1995).

n231. See Model Rules of Professional Conduct Rule 3.4 cmt. (1995).

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[\*1094]

Despite the expressive force and influence of lawyer competence and candor decrees, misconduct in the prosecution n232 and defense of criminal proceedings continues, especially with respect to race. n233 The persistence of lawyer misconduct suggests that the positivist discourse that pervades the Model Code and Model Rules lacks a shared sense of appropriate normative direction sufficient to foster moral virtue. n234 Revitalizing lawyers' sense of virtue through legal education and skills training is likely to prove futile. Put starkly, the standard conventions of legal education and training afford little opportunity for the experiential learning and critical reflection needed to inculcate virtue. Even with the benefit of such opportunity, the resulting sense of professional virtue, backed by a law-induced vision of justice, falls subject to widespread public suspicion. n235

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n232. See Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 Fordham L. Rev. 851, 890-910 (1995).

n233. See Elizabeth L. Earle, Note, Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism, 92 Colum. L. Rev. 1212 (1992).

n234. See Reed Elizabeth Loder, Tighter Rules of Professional Conduct: Saltwater for Thirst?, 1 Geo. J. Legal Ethics 311 (1987); Maura Strassberg, Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics, 80 Iowa L. Rev. 901 (1995).

n235. See Christopher L. Eisgruber, The Fourteenth Amendment's Constitution, 69 S. Cal. L. Rev. 47, 83 (1995).

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Practical wisdom stocks no means to rescue virtue from the impoverished training of legal education. If virtue is to be salvaged, it will be recovered from the values of citizenship, multi-racial community, and spirituality. n236 Each of these spheres provides a source of identity crucial to the attainment of virtue. Kenneth Anderson asserts the importance of the individual possession and development of "diverse and cross-cutting identities" extracted from the multiple domains (such as religion and family) of civil society. n237 For Anderson, ethical conduct "depends upon the possession of strong identities outside the profession." n238 Representing race with competence and candor hinges on the strength of attorney-client identities outside of the law and ethics of lawyering.

## -Footnotes-

n236. On the virtue ethics tradition, see Heidi Li Feldman, Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?, 69 S. Cal. L. Rev. 885 (1996).

n237. Anderson, *supra* note 195, at 1072.

n238. *Id.*

## -End Footnotes-

The identity-making power of citizenship, community, and spirituality builds moral character and virtue from sources outside the law. n239 Like the practice of criminal defense representation, the practice of virtue in advocacy entails both competence and candor. [\*1095] Competence alone, however, furnishes no moral assurance of advancing a greater social good. n240 Candor at least proffers an "openness to others" n241 essential to the creation of a racially diverse community. n242

## -Footnotes-

n239. Endorsing the turn to virtue ethics in the discussion of lawyerly professional responsibility, Atkinson urges that:

We must widen our perspective from a focus on particular acts, whether the acts are conceived in terms of their agent's motives or their effects on others. We must include the agent's general dispositions, vices, and virtues - in a word, his or her character. In focusing on character and its development, we see how we are made to do what we do, and, conversely, how what we do and why we do it make us who we are. Most importantly, we learn who we want to be.

Atkinson, *supra* note 182, at 217 (footnotes omitted).

n240. John DiPippa observes that the loss of moral community deprives a lawyer of the moral assurance that his work offers morally efficacious service. See John M.A. DiPippa, Lon Fuller, the Model Code, and the Model Rules, 37 S. Tex. L. Rev. 303, 356 (1996).

n241. Atkinson, *supra* note 182, at 220; see also J. Kevin Quinn et al., Resisting the Individualistic Flavor of Opposition to Model Rule 3.3, 8 Geo. J. Legal Ethics 901 (1995).

n242. Cf. Vogelmann, *supra* note 125, at 575 (insisting that "arguments catering to racism or other prejudices are not legally relevant and surely assault the dignity of our courts and are degrading toward our system of justice" (footnote omitted)). See generally Colin Croft, Note, Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community, 67 N.Y.U. L. Rev. 1256, 1321-51 (1992).

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## B. Citizenship

The norm of citizenship contributes a transformative notion of community obligation to the ethic of race-conscious responsibility. Although political, the norm betrays doubts about the suitability of lawyers' political judgments. n243 The political character of the norm instead pertains to the meaning of lawyer community participation in matters of democratic citizenship that cut across racial lines.

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n243. Eisgruber explains:

It is not obvious that lawyers are especially good at reading [constitutional] credos or that they know more than most people about things that a constitutional credo might describe - values, aspirations and characteristics of political identity. The conventions of the profession might actually deaden the political sensibilities of lawyers, making them especially ill-suited to read credos.

Eisgruber, *supra* note 235, at 83.

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The norm of citizenship encourages lawyer crosscutting community participation in an effort to achieve a fuller individual sense of collective, multiracial identity. Unlike David Abraham's "complete citizen," n244 the lawyer-citizen seeks more than a "relatively unfettered" sense of community membership and self-governance. n245 Indeed, he seeks the richness of racially diverse citizenship, not merely a state of relative self-sufficiency. n246

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n244. David Abraham, *Liberty without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, 21 *Law & Soc. Inquiry* 1, 51 (1996).

n245. *Id.*; see also Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (1991); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *Geo. J. Legal Ethics* 241 (1992).

n246. On self-sufficiency and citizenship, see James W. Fox, Jr., *Liberalism, Democratic Citizenship, and Welfare Reform: The Troubling Case of Workfare*, 74 *Wash. U. L.Q.* 103, 114-49 (1996); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 *Yale L.J.* 1563 (1996) (book review).

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[\*1096]

The concept of citizenship enlivening the lawyer-citizen ideal reaches beyond the private, self-identity of the sovereign subject to hold up a public, racially integrated version of the self. Frederick Dolan finds the self "constituted through a plurality of judgments and narratives of others." n247 For Dolan, this public self is a product of the "plural and variable character of human interaction, especially symbolic or discursive interaction." n248 Even when that interaction embroils the dichotomies of racial hierarchy, this public self may acquire what Dolan describes as "a distinctive, coherent, and stable identity." n249 According to this analysis, identity evolves through language and intersubjective action. The presence of an alternative, public self demonstrates the "linguistic and interpretive character of identity." n250

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n247. Frederick M. Dolan, Political Action and the Unconscious: Arendt and Lacan on Decentering the Subject, 23 Pol. Theory 330, 342 (1995).

n248. Id.

n249. Id.

n250. Id. at 343.

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The public, self-identity of the lawyer-citizen gives rise to broad community obligations in criminal defense practice. Those obligations include the building and strengthening of interracial communities. n251 Although the communitarian account of race and community is underdeveloped, n252 its component elements of social deliberation and public-private partnership show transformative potential. n253

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n251. See John A. Powell, Living and Learning: Linking Housing and Education, 80 Minn. L. Rev. 749, 791-92 (1996) ("Integration makes it possible for those historically excluded from participating in society to be part of a larger community, while necessarily transforming that community.").

n252. See Derrick Bell & Preeta Bansal, The Republican Revival and Racial Politics, 97 Yale L.J. 1609 (1988); Wendy Brown-Scott, The Communitarian State: Lawlessness or Law Reform for African-Americans?, 107 Harv. L. Rev. 1209 (1994); Stephen M. Feldman, Whose Common Good? Racism in the Political Community, 80 Geo. L.J. 1835 (1992).

n253. See Charles R. Lawrence, III, Race, Multiculturalism, and the Jurisprudence of Transformation, 47 Stan. L. Rev. 819 (1995).

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### C. Race Consciousness

The norm of race consciousness forms the core of the ethic of race-conscious responsibility. This norm stands against the violently contested history of

race consciousness in American law. n254 [\*1097] The upshot of this contest finds articulation in the "racial rule of differentiation." n255 While subordination often accompanies the application of the rule of differentiation, differentiation itself does not necessarily imply subordination. Nor does the dissonance of racial identity carry such an implication.

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n254. See Richard Delgado, *The Rodrigo Chronicles: Conversations about America and Race* (1995); T. Alexander Aleinikoff, *supra* note 87; T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 Colo. L. Rev. 325 (1992); Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758; see also Jonathan Feldman, *Race-Consciousness Versus Colorblindness in the Selection of Civil Rights Leaders: Reflections upon Jack Greenberg's Crusaders in the Courts*, 84 Cal. L. Rev. 151 (1996) (review essay).

n255. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 36-75 (1995).

-End Footnotes-

The norm of race consciousness hinges on a commitment to multiracial community that honors differentiation and diversity as integral parts of collective dialogue. That commitment urges the exploration of hate speech regulation, n256 especially when community sentiment veers toward violence. The interpretive and physical violence embodied in the racialized defenses of jury nullification, victim denigration, and diminished capacity extends the instant realm of hate speech regulation to the rhetoric of the courtroom.

-Footnotes-

n256. See, e.g., *Words that Wound* (Mari Matsuda et al. eds., 1993); Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* 17 (Henry Louis Gates, Jr. et al. eds., 1995).

-End Footnotes-

At the outset, it is important to distinguish the regulation of lawyers' courtroom speech from restrictions on lawyers' extra-judicial statements. n257 In contrast to the regulation of extra-judicial comment, the regulation of courtroom speech instigates broad fear of constitutional intrusion. n258 Allaying this fear requires a race-conscious defense of state intervention in the private and public exercise of speech rights. n259

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n257. Cf. Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 Ariz. L. Rev. 291 (1996); Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. Rev. 494 (1993).

n258. On the shared social critique of First Amendment doctrine by prewar and post-war progressives, see J.M. Balkin, *Some Realism About Pluralism: Legal*

Realist Approaches to the First Amendment, 1990 Duke L.J. 375; David M. Rabban, Free Speech in Progressive Social Thought, 74 Texas L. Rev. 951 (1996).

n259. Such a defense addresses state sanctioned acts of racial discrimination as forms of state action, rather than as " 'neutral background' " facts. Roberts, *supra* note 187, at 390.

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In this light, consider Owen Fiss's recent defense of state action. n260 Fiss conceives of the "state as parliamentarian," contending [\*1098] that the First Amendment principle of democratic self-governance "does not protect merely choice by citizens, but rather choice made with adequate information and under suitable conditions of reflection." n261 To the extent that racialized defenses constitute an uninformed and unreflective hate-speech-inspired choice of lawyer and client citizens, the justification for governmental regulation gathers force. n262

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n260. Fiss observes:

In intervening in this manner, the state is protecting the speech rights of the blacks, and it can do so only by restricting the range of speech acts in which racists are allowed to engage. In favoring the speech rights of blacks in this way, the state is not making a judgment about the merit - constitutional or other - of the views each side is likely to express, through "fighting words" or otherwise, but only that this sector of the community must be heard from more fully if the public is to make an informed choice about an entire range of issues on the public agenda, from affirmative action, to education, to welfare policy. The state is acting as a parliamentarian trying to end a pattern of behavior that silences one group and thus distorts or skews public debate. The state is not trying to usurp the public's right of collective self-determination, but rather to enhance the public's capacity to properly exercise that right.

Owen Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 Capital U. L. Rev. 281, 288 (1995).

n261. *Id.* at 288-89.

n262. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996).

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Nevertheless, some may object that application of the rule of racial differentiation to regulate hate speech constitutes an " 'invasive preference.' " n263 Pointing to the lawyer-client relationship, Luban defines an invasive preference as "an individual preference for an option that someone else has

excluded as a matter of right." n264 He finds evidence of invasive preference when a lawyer overrides the stated preference of a client. Override, Cathy Mansfield suggests, may consist of the "act of taking utilitarian control of a client's story by placing legal construct upon it." n265 Construed as an act of client domination, utilitarian control may arise in other substantive law areas outside of the criminal law. n266 Whatever the substantive law at stake, the crux of hate speech regulation concerns securing voluntary lawyer-client agreement to refrain from harmful, racialized rhetoric. The next section examines the possibility of reaching such agreement through shared spirituality.

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n263. David Luban, *Social Choice Theory as Jurisprudence*, 69 S. Cal. L. Rev. 521, 551 (1996).

n264. *Id.*

n265. Mansfield, *supra* note 46, at 918. Mansfield argues: "The act of taking utilitarian control of a client's story by placing legal construct upon it is legitimate only if the attorney distills and interprets the client's story toward the client's goal." *Id.* at 918 (footnote omitted).

n266. See George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. Rev. 347 (1996).

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[\*1099]

#### D. Spirituality

The norm of spirituality completes the ethic of race-conscious responsibility. Contemporary writing on ethics evinces a turn to spirituality in law and the legal profession. n267 A similar shift is visible in the medical profession. n268 In jurisprudence, however, the shift marks a departure from formalism and instrumentalism prompted by the search for values absent from or external to law. n269

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n267. See, e.g., *Radical Christian and Exemplary Lawyer* (Andrew W. McThenia, Jr. ed., 1995); Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 U. Ill. L. Rev. 1007; Russell G. Pearce, *The Jewish Lawyer's Question*, 27 Tex. Tech. L. Rev. 1259 (1996); Thomas L. Shaffer, *Maybe A Lawyer Can Be A Servant; If Not ...*, 27 Tex. Tech. L. Rev. 1345 (1996).

n268. See, e.g., Russell B. Connors, Jr. & Martin L. Smith, *Religious Insistence on Medical Treatment: Christian Theology and Re-Imagination*, Hastings Center Rep., July-Aug. 1996, at 23.

n269. See George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 Loy. L.A. L. Rev. 545, 575 (1996) (rejecting both formalism and neo-Wittgensteinian approaches for their refusal to justify decisions on